

Info ▼

VERSIONS: Full volume

Wisconsin Juvenile Law Handbook

Summary of Developments

Foreword

Preface

About the Authors

About the Supplement Authors

Editorial Review Board—1996 Edition

How to Cite This Book

Access to Downloadable Forms

Summary of Contents

Table of Contents

Table of Contents—New and Replaced Sections

2024–25 Supplement

Supplement Chapter 1

Introduction

Chapter 1

Introduction

Supplement Chapter 2

Rights of Children, Parents, and Expectant Mothers

2.1 Scope of Chapter

2.5 [Right to Counsel] [The Child] Delinquency

2.13 [Right to Counsel] [Parents] Termination of Parental Rights

2.14 [Right to Counsel] [Parents] CHIPS and JIPS

2.29 [Burden of Proof] CHIPS, UCHIPS, and TPR Adjudications

2.31 [Burden of Proof] Postadjudicatory Stage

Chapter 2

Rights of Children, Parents, and Expectant Mothers

I. Scope of Chapter [§ 2.1]

II. Right to Counsel [§ 2.2]

A. In General [§ 2.3]

B. The Child [§ 2.4]

1. Delinquency [§ 2.5]

2. CHIPS and JIPS [§ 2.6]

3. UCHIPS [§ 2.7]

4. Termination of Parental Rights [§ 2.8]

5. Wis. Stat. Ch. 51 and Wis. Stat. Ch. 55 Proceedings [§ 2.9]

6. Criminal Contempt [§ 2.10]

- C. Parents [§ 2.11]
  - 1. Delinquency [§ 2.12]
  - 2. Termination of Parental Rights [§ 2.13]
  - 3. CHIPS and JIPS [§ 2.14]
- D. Adult Expectant Mothers: UCHIPS [§ 2.15]
- E. Valid Waiver of Right to Counsel [§ 2.16]
- III. Right to Jury Trial at Fact-Finding Stage [§ 2.17]
  - A. Delinquency and JIPS [§ 2.18]
  - B. CHIPS [§ 2.19]
  - C. UCHIPS [§ 2.20]
  - D. Termination of Parental Rights [§ 2.21]
- IV. Right to Remain Silent [§ 2.22]
  - A. Right Against Self-Incrimination in Juvenile Court Proceedings [§ 2.23]
  - B. Right Against Self-Incrimination When Potential Exists for Criminal or Quasi-criminal Prosecution [§ 2.24]
- V. Right of Confrontation and Cross-examination; Right to Present and Subpoena Witnesses [§ 2.25]
- VI. Right Against Unreasonable Search and Seizure [§ 2.26]
- VII. Burden of Proof [§ 2.27]
  - A. Delinquency Adjudications [§ 2.28]
  - B. CHIPS, UCHIPS, and TPR Adjudications [§ 2.29]
  - C. JIPS Adjudications Under Wis. Stat. Ch. 938 [§ 2.30]
  - D. Postadjudicatory Stage [§ 2.31]
  - E. Waiver Proceedings [§ 2.32]
- VIII. Notice as a Fundamental Right [§ 2.33]
- IX. Substitution of Judge [§ 2.34]
- X. Standard Juvenile Court Forms [§ 2.35]
- Supplement Chapter 3
- Roles of the Parties in Juvenile Court
- 3.1 Scope of Chapter
- 3.2 Role of Defense Attorney
- 3.7 Role of Guardian ad Litem
- Chapter 3
- Roles of the Parties in Juvenile Court
- I. Scope of Chapter [§ 3.1]
- II. Role of Defense Attorney [§ 3.2]
- III. Role of Prosecutor [§ 3.3]
  - A. Types of Cases Under Wis. Stat. Ch. 48 [§ 3.4]
  - B. Types of Cases Under Wis. Stat. Ch. 938 [§ 3.5]
  - C. Exercise of Prosecutorial Discretion [§ 3.6]
- IV. Role of Guardian ad Litem [§ 3.7]
- V. Role of Juvenile Court [§ 3.8]
  - A. In General [§ 3.9]

B. Juvenile Court Judge [§ 3.10]

C. Circuit Court Commissioners [§ 3.11]

## VI. Role of Intake Worker [§ 3.12]

A. In General [§ 3.13]

B. Intake Worker as Police Officer or Deputy Sheriff and Magistrate [§ 3.14]

C. Intake Worker as Investigator and Advisor to Corporation Counsel and District Attorney [§ 3.15]

D. Intake Worker as Counselor [§ 3.16]

E. Intake Worker as Advisor to the Court [§ 3.17]

## VII. Role of Social Service Agency and Department of Corrections [§ 3.18]

## VIII. Role of Police [§ 3.19]

## IX. Role of Court-Appointed Special Advocate (CASA) [§ 3.20]

## X. Standard Juvenile Court Forms [§ 3.21]

## Supplement Chapter 4

### Jurisdiction and Venue

#### 4.1 Scope of Chapter

4.17 [Jurisdiction Under Juvenile Justice and Children's Codes] [Juveniles Alleged to Be Delinquent] [Exclusive Original Adult Court Jurisdiction] In General

4.25 [Jurisdiction Under Juvenile Justice and Children's Codes] Children Alleged to Be in Need of Protection or Services

#### Chapter 4

### Jurisdiction and Venue

#### I. Scope of Chapter [§ 4.1]

#### II. Jurisdiction Under Juvenile Justice and Children's Codes [§ 4.2]

A. In General [§ 4.3]

B. Juveniles Alleged to Be Delinquent [§ 4.4]

1. In General [§ 4.5]

2. Offense Committed When Juvenile Under 10 but Charged When Juvenile Older Than 10 [§ 4.6]

3. Offense Committed When Juvenile Older Than 10 but Charged in Adult Court After Individual Has Turned 17 [§ 4.7]

a. In General [§ 4.8]

b. State Aware of Offense While Individual Is a Juvenile but Delays Charging Until Individual Is an Adult [§ 4.9]

c. State Does Not Discover Offenses Committed by Juvenile Until After Individual Turns 17 [§ 4.10]

4. Offense Committed and Delinquency Petition Filed When Individual Is a Juvenile but Individual Reaches Age 17 While Proceedings Pending [§ 4.11]

a. In General [§ 4.12]

b. Juvenile Turns 17 Before Adjudication [§ 4.13]

c. Juvenile Turns 17 After Adjudication [§ 4.14]

5. Waiver of Juvenile Court Jurisdiction [§ 4.15]

6. Exclusive Original Adult Court Jurisdiction [§ 4.16]

a. In General [§ 4.17]

b. Transfer from Adult Court to Juvenile Court (Reverse Waiver) [§ 4.18]

c. Dispositions and Sentences [§ 4.19]

7. Statutes of Limitation [§ 4.20]

8. Jurisdiction over Certain Indian Juveniles [§ 4.21]

- a. Wisconsin Indian Child Welfare Act (WICWA) and Federal Indian Child Welfare Act (ICWA) [§ 4.22]
  - b. Delinquency [§ 4.23]
- C. Juveniles Alleged to Be in Need of Protection or Services [§ 4.24]
- D. Children Alleged to Be in Need of Protection or Services [§ 4.25]
- E. Unborn Children Alleged to Be in Need of Protection or Services [§ 4.26]
- F. Civil Laws, Ordinances, and Truancy [§ 4.27]
- G. Traffic, Boating, Snowmobile, All-Terrain Vehicle, Utility Terrain Vehicle, and Limited-Use Off-Highway Motorcycle Violations [§ 4.28]
- H. Wis. Stat. Chs. 51 and 55 [§ 4.29]
- I. Waiver of Parental Consent to Abortion [§ 4.30]
- J. Jurisdiction over Adults [§ 4.31]
- K. Other Matters [§ 4.32]
- L. Concurrent Jurisdiction with Other Courts in Determining Legal Custody [§ 4.33]
- III. Venue: Wis. Stat. §§ 48.185 and 938.185 [§ 4.34]
  - A. In General [§ 4.35]
  - B. Delinquency, JIPS, Waiver, and Civil Law and Ordinance Violations [§ 4.36]
  - C. Children or Unborn Children in Need of Protection and Services [§ 4.37]
  - D. Guardianship Under Wis. Stat. § 48.977 and Termination of Parental Rights [§ 4.38]
  - E. Extended Out-of-Home Care [§ 4.39]
  - F. Changes in Placement, Revision, and Extension of CHIPS, UCHIPS, and JIPS Dispositional Orders [§ 4.40]
  - G. Change in Placement; Posttermination of Parental Rights [§ 4.41]
- IV. Charts [§ 4.42]
  - A. Jurisdiction Under Wis. Stat. Ch. 938 by Age and Offense [§ 4.43]
  - B. Original Adult Court Jurisdiction: Procedure [§ 4.44]
- V. Practice Form [§ 4.45]
  - A. Motion for Change of Venue (Form CRM-0174) [§ 4.46]
- VI. Standard Juvenile Court Forms [§ 4.47]
- Supplement Chapter 5
- Physical Custody
- 5.1 Scope of Chapter
- 5.4 [Definitions and Other General Provisions] Places for Holding Child or Expectant Mother in Physical Custody
- 5.11 Release or Delivery from Custody
- 5.15 [Criteria for Keeping Child or Expectant Mother in Custody] Holding Child in Juvenile Detention Facility
- 5.42 [Postadjudication Commitment to Secure Custody] Disposition Under Wis. Stat. § 938.34(4m)
- 5.60 Standard Juvenile Court Forms
- Chapter 5
- Physical Custody
- I. Scope of Chapter [§ 5.1]
- II. Definitions and Other General Provisions [§ 5.2]
  - A. Types of Custody [§ 5.3]
  - B. Places for Holding Child or Expectant Mother in Physical Custody [§ 5.4]
- III. Criteria for Taking Child or Expectant Mother into Custody [§ 5.5]



- A. Who Can Take Child or Expectant Mother into Custody [§ 5.6]
- B. Court Order or Violation of Court Order [§ 5.7]
- C. Reasonable Grounds and Probable Cause [§ 5.8]
- D. Welfare of Child or Unborn Child [§ 5.9]
- E. Truancy [§ 5.10]
- IV. Release or Delivery from Custody [§ 5.11]
- V. Criteria for Keeping Child or Expectant Mother in Custody [§ 5.12]
  - A. In General [§ 5.13]
  - B. Holding Child or Expectant Mother in Physical Custody [§ 5.14]
  - C. Holding Child in Juvenile Detention Facility [§ 5.15]
  - D. Holding Child in County Jail or Municipal Lockup Facility [§ 5.16]
- VI. Notice [§ 5.17]
- VII. Detention Hearing [§ 5.18]
  - A. Overview [§ 5.19]
  - B. Procedure [§ 5.20]
    - 1. In General [§ 5.21]
    - 2. Juveniles Alleged to Be Delinquent or Not Responsible or Not Competent [§ 5.22]
      - a. In General [§ 5.23]
      - b. Appraisal of Rights [§ 5.24]
      - c. Waiver of Hearing [§ 5.25]
      - d. Rehearing [§ 5.26]
    - 3. Children or Unborn Children in Need of Protection or Services [§ 5.27]
      - a. In General [§ 5.28]
      - b. Appraisal of Rights [§ 5.29]
      - c. Waiver of Hearing [§ 5.30]
      - d. Rehearing [§ 5.31]
    - 4. Juveniles in Need of Protection or Services [§ 5.32]
      - a. In General [§ 5.33]
      - b. Appraisal of Rights [§ 5.34]
      - c. Waiver of Hearing [§ 5.35]
      - d. Rehearing [§ 5.36]
  - C. Role of Defense Counsel [§ 5.37]
  - D. Custody Orders [§ 5.38]
  - E. Appeals of Custody Orders [§ 5.39]
- VIII. Postadjudication Commitment to Secure Custody [§ 5.40]
  - A. In General [§ 5.41]
  - B. Disposition Under Wis. Stat. § 938.34(4m) [§ 5.42]
  - C. Short-Term Detention Under Wis. Stat. § 938.34(3)(f) [§ 5.43]
  - D. Change in Placement Under Wis. Stat. § 938.357(3) [§ 5.44]
  - E. Sanctions Under Wis. Stat. § 938.355(6) and (6m) [§ 5.45]
  - F. Contempt Under Wis. Stat. Ch. 785 [§ 5.46]

G. Short-Term Detention by Caseworker Under Wis. Stat. § 938.355(6d) [§ 5.47]

IX. Custodial Interrogation [§ 5.48]

X. Practice Forms [§ 5.49]

A. Notice and Motion for Amendment of Detention Order (Form CRM-0175) [§ 5.50]

B. Order for Amendment of Detention Order (Form CRM-0176) [§ 5.51]

C. Request for a New Detention Hearing and for a Revision of the Detention Order (Form CRM-0177) [§ 5.52]

D. Motion to Review the Decision of the Circuit Court Commissioner (Form CRM-0178) [§ 5.53]

E. Motion for Release from Secure Detention (Form CRM-0179) [§ 5.54]

F. Motion for Release from Secure Custody and for an Alternative Placement Pending Adjudication (Form CRM-0180) [§ 5.55]

G. Petition for Writ of Habeas Corpus (Form CRM-0181) [§ 5.56]

H. Writ of Habeas Corpus and Order for Temporary Release (Form CRM-0182) [§ 5.57]

I. Motion to Release from Custody for Failure to Comply with Wis. Stat. § 938.21 (Form CRM-0183) [§ 5.58]

J. Motion to Release from Custody for Failure to Comply with Wis. Stat. § 938.205 (Form CRM-0184) [§ 5.59]

XI. Standard Juvenile Court Forms [§ 5.60]

Supplement Chapter 6

Intake Inquiry

6.1 Scope of Chapter

6.3 [What Is an Intake Inquiry?] Purpose

6.37 [Challenges to Intake Recommendation] [By Defense Counsel] Erroneous Termination of Informal Disposition or Deferred Prosecution Agreement for Noncompliance

Chapter 6

Intake Inquiry

I. Scope of Chapter [§ 6.1]

II. What Is an Intake Inquiry? [§ 6.2]

A. Purpose [§ 6.3]

B. Procedure [§ 6.4]

C. Multidisciplinary Screen [§ 6.5]

III. Notice and Appraisal of Rights [§ 6.6]

IV. Actions of Intake Worker [§ 6.7]

A. In General [§ 6.8]

B. Closure of Case [§ 6.9]

C. Informal Disposition and Deferred Prosecution [§ 6.10]

1. Criteria [§ 6.11]

2. Terms of Informal Disposition or Deferred Prosecution Agreement [§ 6.12]

a. In General [§ 6.13]

b. Counseling or Diversion [§ 6.14]

c. Drug and Alcohol Assessment and Treatment [§ 6.15]

d. Restitution [§ 6.16]

e. Supervised Work Program or Other Community Service Work [§ 6.17]

f. Volunteers in Probation [§ 6.18]

g. Teen Court Program [§ 6.19]

h. Youth Report Centers [§ 6.20]

- i. Parents' Attendance at School [§ 6.21]
  - j. Exclusions [§ 6.22]
- 3. Termination of Informal Disposition or Deferred Prosecution Agreement [§ 6.23]
  - a. Voluntary [§ 6.24]
  - b. Noncompliance [§ 6.25]
  - c. Compliance [§ 6.26]
  - d. Filing of Petition [§ 6.27]
- D. Referral for Filing of Petition [§ 6.28]
- V. Challenges to Intake Recommendation [§ 6.29]
  - A. By State or County [§ 6.30]
  - B. By Defense Counsel [§ 6.31]
    - 1. In General [§ 6.32]
    - 2. Violation of 60-Day Time Period for CHIPS and UCHIPS Cases and Violation of 40-Day Time Period for JIPS and Delinquency Cases [§ 6.33]
      - a. In General [§ 6.34]
      - b. Police Reports [§ 6.35]
      - c. Referral by Another County [§ 6.36]
    - 3. Erroneous Termination of Informal Disposition or Deferred Prosecution Agreement for Noncompliance [§ 6.37]
- VI. Standard Juvenile Court Forms [§ 6.38]
- Supplement Chapter 7
- Filing of a Petition (CHIPS, JIPS, and Delinquency Cases)
- 7.1 Scope of Chapter
- 7.13 [Procedure] [Time Periods] [When Intake Worker Requests That Petition Be Filed] Twenty-Day Time Period
- 7.18 [Sufficiency of Petition] Formal Requirements
- 7.19 [Sufficiency of Petition] Probable Cause
- 7.22 [Sufficiency of Petition] [Challenges to Sufficiency] Lack of Probable Cause
- 7.25 [Sufficiency of Petition] Amendment of Petition
- 7.32 Standard Juvenile Court Forms
- Chapter 7
- Filing of a Petition (CHIPS, UCHIPS, JIPS, and Delinquency Cases)
- I. Scope of Chapter [§ 7.1]
- II. Procedure [§ 7.2]
  - A. In General [§ 7.3]
  - B. Who Must Sign Petition [§ 7.4]
  - C. Who Is Authorized to File Petition [§ 7.5]
    - 1. Delinquency Petitions [§ 7.6]
    - 2. CHIPS, UCHIPS, and JIPS Petitions [§ 7.7]
    - 3. Delegation of Power by Parent [§ 7.8]
  - D. Challenging the Decision Not to File Petition [§ 7.9]
  - E. Time Periods [§ 7.10]
    - 1. In General [§ 7.11]
    - 2. When Intake Worker Requests That Petition Be Filed [§ 7.12]

- a. Twenty-Day Time Period [§ 7.13]
- b. Extension Granted by Court [§ 7.14]
- c. Statement of Reasons Attached to Late Petition [§ 7.15]

3. When Intake Worker Closes Case or Enters into Deferred Prosecution Agreement Under Wis. Stat. Ch. 938 [§ 7.16]

III. Sufficiency of Petition [§ 7.17]

- A. Formal Requirements [§ 7.18]
- B. Probable Cause [§ 7.19]
- C. Challenges to Sufficiency [§ 7.20]
  - 1. In General [§ 7.21]
  - 2. Lack of Probable Cause [§ 7.22]
  - 3. Lack of Notice [§ 7.23]
  - 4. Material Misstatement [§ 7.24]
- D. Amendment of Petition [§ 7.25]

IV. Practice Forms [§ 7.26]

- A. Motion to Dismiss the Petition (Form CRM-0185) [§ 7.27]
- B. Motion to Dismiss or, in the Alternative, to Remand the Proceeding to the Intake Stage (Form CRM-0186) [§ 7.28]
- C. Motion to Dismiss the Petition for Failure to Comply with Statutory Time Periods (Form CRM-0187) [§ 7.29]
- D. Motion to Strike or, in the Alternative, to Make the Petition More Specific (Form CRM-0188) [§ 7.30]
- E. Notice of Amendment of Petition (Form CRM-0189) [§ 7.31]

V. Standard Juvenile Court Forms [§ 7.32]

Supplement Chapter 8

Plea Hearing

8.1 Scope of Chapter

8.24 Procedure

8.48 Standard Juvenile Court Forms

Chapter 8

Plea Hearing

I. Scope of Chapter [§ 8.1]

II. Procedure [§ 8.2]

- A. Notice [§ 8.3]
- B. Appearances [§ 8.4]
- C. Use of Restraints [§ 8.5]
- D. Proceedings Conducted by Telephone or by Live Audiovisual Means [§ 8.6]
- E. Time Periods [§ 8.7]
- F. Appraisal of Rights [§ 8.8]

III. Role of Defense Counsel [§ 8.9]

- A. Substitution of Judge [§ 8.10]
  - 1. Nature of the Right [§ 8.11]
  - 2. Procedure [§ 8.12]
- B. Jury Trial Request [§ 8.13]
- C. Motions to Dismiss the Petition [§ 8.14]

- 1. Time Period Violations [§ 8.15]
- 2. Challenges to Sufficiency [§ 8.16]
- D. Effect of Entering Plea on Waiver [§ 8.17]
- E. Placement of Child or Expectant Mother Pending Proceedings [§ 8.18]
- IV. Plea Bargaining [§ 8.19]
  - A. Nature of Plea Bargaining [§ 8.20]
  - B. Role of Defense Counsel [§ 8.21]
  - C. Consent Decrees [§ 8.22]
    - 1. What Is a Consent Decree [§ 8.23]
    - 2. Procedure [§ 8.24]
    - 3. Terms and Conditions of a Consent Decree [§ 8.25]
      - a. Volunteers in Probation [§ 8.26]
      - b. Youth Report Centers [§ 8.27]
      - c. Drug and Alcohol Treatment and Education [§ 8.28]
      - d. Restitution [§ 8.29]
      - e. Supervised Work Program [§ 8.30]
      - f. Teen Court Program [§ 8.31]
      - g. School Attendance [§ 8.32]
      - h. Work for Graffiti Violations [§ 8.33]
      - i. Court-Appointed Special Advocate (CASA) [§ 8.34]
    - 4. Findings Required When Child Living Outside the Home [§ 8.35]
    - 5. Permanency Hearing [§ 8.36]
    - 6. Termination of Consent Decree [§ 8.37]
      - a. Objection [§ 8.38]
      - b. Compliance [§ 8.39]
      - c. Noncompliance [§ 8.40]
        - (1) Extension of Consent Decree [§ 8.41]
        - (2) Reinstatement of Petition [§ 8.42]
    - 7. Recusal of Judge [§ 8.43]
  - V. Admissions [§ 8.44]
  - VI. Pleas of Not Responsible by Reason of Mental Disease or Defect in Delinquency Case [§ 8.45]
  - VII. Practice Form [§ 8.46]
    - A. Request for Substitution of Judge (Form CRM-0190) [§ 8.47]
  - VIII. Standard Juvenile Court Forms [§ 8.48]

## Supplement Chapter 9

### Discovery and Other Motion Practice

#### 9.1 Scope of Chapter

9.7 [Discovery] [Rules Applicable to CHIPS, UCHIPS, Delinquency, JIPS, and TPR Proceedings] Relevant Records

9.34 [Discovery] [Rules Applicable Specifically in Delinquency Proceedings] [Discovery and Inspection of Evidence] In Camera Proceedings

9.47 [Pretrial Motion Practice] [Suppression Motions in Delinquency Cases] Confessions

#### Chapter 9

## Discovery and Other Motion Practice

### I. Scope of Chapter [§ 9.1]

### II. Procedure [§ 9.2]

### III. Discovery [§ 9.3]

#### A. Rules Applicable to CHIPS, UCHIPS, Delinquency, JIPS, and TPR Proceedings [§ 9.4]

1. Police Reports [§ 9.5]
2. Confidential Informers [§ 9.6]
3. Relevant Records [§ 9.7]

#### B. Rules Applicable Specifically in Delinquency Proceedings [§ 9.8]

1. Nature of the Right to Discovery [§ 9.9]
2. Discovery and Inspection of Evidence [§ 9.10]
  - a. In General [§ 9.11]
  - b. What the State Is Required to Disclose [§ 9.12]
    - (1) In General [§ 9.13]
    - (2) Juvenile's Statements [§ 9.14]
    - (3) Prior Juvenile Record [§ 9.15]
    - (4) Physical Evidence [§ 9.16]
    - (5) Intercepted Communications [§ 9.17]
    - (6) Witness List [§ 9.18]
    - (7) Witness Statements [§ 9.19]
    - (8) Criminal Record of Witnesses [§ 9.20]
    - (9) Exculpatory Evidence [§ 9.21]
    - (10) DNA Evidence [§ 9.22]
  - c. What the Juvenile Is Required to Disclose [§ 9.23]
    - (1) In General [§ 9.24]
    - (2) Witness Lists [§ 9.25]
    - (3) Witness Statements [§ 9.26]
    - (4) Criminal Record of Witnesses [§ 9.27]
    - (5) Physical Evidence [§ 9.28]
    - (6) Notice of Alibi [§ 9.29]
    - (7) DNA Evidence [§ 9.30]
  - d. Scientific Testing [§ 9.31]
  - e. Continuing Duty [§ 9.32]
  - f. Protective Orders [§ 9.33]
  - g. In Camera Proceedings [§ 9.34]

3. Juvenile Waiver [§ 9.35]

#### C. Rules Applicable Specifically in CHIPS, UCHIPS, and TPR Proceedings [§ 9.36]

1. Role of the Rules of Civil Procedure [§ 9.37]
1. Privileges and Other Protections [§ 9.38]
2. Discovery and the Right Against Self-incrimination [§ 9.39]

### IV. Pretrial Motion Practice [§ 9.40]

- A. In General [§ 9.41]
- B. Time Periods for Bringing Motions [§ 9.42]
- C. Challenges to Requests for Psychological Evaluations [§ 9.43]
- D. Suppression Motions in Delinquency Cases [§ 9.44]
  - 1. In General [§ 9.45]
  - 2. Illegal Arrest [§ 9.46]
  - 3. Confessions [§ 9.47]
  - 4. Searches [§ 9.48]
- E. Motions to Exclude Other Acts Evidence [§ 9.49]
- F. Competency [§ 9.50]
- G. Motion for Court-Ordered Informal Disposition or Deferred Prosecution [§ 9.51]
- V. Practice Forms [§ 9.52]
  - A. Motion for Delivery of Law Enforcement Officers' Reports (Form CRM-0191) [§ 9.53]
  - B. Order for Delivery of Law Enforcement Officers' Reports (Form CRM-0192) [§ 9.54]
  - C. Demand for Discovery and Inspection (Form CRM-0193) [§ 9.55]
  - D. Motion for Discovery (Form CRM-0194) [§ 9.56]
  - E. Defendant's Response to State's Discovery Demand (Form CRM-0195) [§ 9.57]
  - F. Letter to Request Inspection or Delivery of Records (Form CRM-0196) [§ 9.58]
  - G. Release and Motion for Inspection of Records (Form CRM-0197) [§ 9.59]
  - H. Order for Inspection of Records (Form CRM-0198) [§ 9.60]
  - I. Motion for Protection of Records (Form CRM-0199) [§ 9.61]
  - J. Motion to Suppress Physical Evidence (Form CRM-0200) [§ 9.62]
  - K. Motion to Suppress Statements (Form CRM-0201) [§ 9.63]
  - L. Motion to Suppress Identification (Form CRM-0202) [§ 9.64]
  - M. Motion for Severance of Juvenile Defendants (Form CRM-0203) [§ 9.65]
  - N. Motion to Sever Charges (Form CRM-0204) [§ 9.66]
  - O. Motion to Suppress (Form CRM-0205) [§ 9.67]

## VI. Standard Juvenile Court Forms [§ 9.68]

### Supplement Chapter 10

#### Fact-Finding Hearing

##### 10.1 Scope of Chapter

#### Chapter 10

#### Fact-Finding Hearing

##### I. Scope of Chapter [§ 10.1]

##### II. What Is a Fact-Finding Hearing? [§ 10.2]

##### III. Procedure [§ 10.3]

###### A. Notice [§ 10.4]

###### B. Who May Be Present [§ 10.5]

###### 1. Public Hearings [§ 10.6]

###### 2. Hearings Closed to the Public [§ 10.7]

###### 3. Exclusion of Child in CHIPS Cases [§ 10.8]

#### 4. Telephonic or Live Audiovisual Testimony [§ 10.9]

### C. Time Periods [§ 10.10]

#### 1. In General [§ 10.11]

#### 2. Exclusions and Continuances [§ 10.12]

#### 3. Reasonable Efforts Findings [§ 10.13]

### D. Use of Depositions Taken by Audiovisual Means [§ 10.14]

### E. Jury Selection [§ 10.15]

### F. Applicability of Rules of Civil Procedure [§ 10.16]

## IV. Prosecutor's Proof [§ 10.17]

## V. Findings of Fact and Conclusions of Law [§ 10.18]

## VI. Summary Judgment [§ 10.19]

## VII. Standard Juvenile Court Forms [§ 10.20]

## Supplement Chapter 11

### Dispositional Hearing

#### 11.1 Scope of Chapter

#### 11.10 [Procedure] [Court Reports] When the Report Must Be in Writing

#### 11.14 [Procedure] [Permanency Plan] What Is a Permanency Plan

#### 11.21 [Procedure] [Dispositional Orders] Contents

#### 11.25 [Dispositional Alternatives in Delinquency and JIPS Cases] Supervision

#### 11.26 [Dispositional Alternatives in Delinquency and JIPS Cases] Placement Outside the Home

#### 11.41 [Dispositional Alternatives in Delinquency and JIPS Cases] Serious Juvenile Offender Program

#### 11.45 [Dispositional Alternatives in Delinquency and JIPS Cases] Sex-Offender Registration

#### 11.52 [CHIPS and UCHIPS Cases] Dispositional Alternatives in CHIPS Cases and UCHIPS Cases Involving Child Expectant Mother

#### 11.62 Standard Juvenile Court Forms

## Chapter 11

### Dispositional Hearing

#### I. Scope of Chapter [§ 11.1]

#### II. Judicial Exercise of Discretion [§ 11.2]

#### III. Procedure [§ 11.3]

##### A. In General [§ 11.4]

##### B. Notice [§ 11.5]

##### C. Time Periods [§ 11.6]

##### D. Evidence and Burden of Proof [§ 11.7]

##### E. Court Reports [§ 11.8]

###### 1. What Is a Court Report [§ 11.9]

###### 2. When the Report Must Be in Writing [§ 11.10]

###### 3. Notice [§ 11.11]

###### 4. Victim-Impact Statement [§ 11.12]

##### F. Permanency Plan [§ 11.13]

###### 1. What Is a Permanency Plan [§ 11.14]

###### 2. Time Periods [§ 11.15]



G. Dispositional Orders [§ 11.16]

1. What Is a Dispositional Order [§ 11.17]
2. Time Periods [§ 11.18]
  - a. CHIPS and UCHIPS Cases [§ 11.19]
  - b. Delinquency and JIPS Cases [§ 11.20]
3. Contents [§ 11.21]

H. Case-Closure Orders [§ 11.22]

IV. Dispositional Alternatives in Delinquency and JIPS Cases [§ 11.23]

- A. In General [§ 11.24]
- B. Supervision [§ 11.25]
- C. Placement Outside the Home [§ 11.26]
- D. Transfer of Legal Custody [§ 11.27]
- E. Drug Offenses [§ 11.28]
- F. Restitution [§ 11.29]
- G. Special Treatment or Care [§ 11.30]
- H. Restriction or Suspension of Driving Privileges [§ 11.31]
- I. Forfeiture [§ 11.32]
- J. Supervised Work Program or Other Community Service Work [§ 11.33]
- K. Youth Report Centers [§ 11.34]
- L. Supervised Independent Living [§ 11.35]
- M. Education Programs [§ 11.36]
- N. Alcohol or Drug Treatment or Education [§ 11.37]
- O. Volunteers in Probation [§ 11.38]
- P. Teen Court [§ 11.39]
- Q. Electronic Monitoring [§ 11.40]
- R. Serious Juvenile Offender Program [§ 11.41]
- S. Victim-Offender Mediation Program [§ 11.42]
- T. Coordinated Services Plan of Care [§ 11.43]
- U. DNA Testing [§ 11.44]
- V. Sex-Offender Registration [§ 11.45]
- W. Other Dispositions [§ 11.46]
- X. Stays of Dispositional Orders [§ 11.47]
- Y. Notice of Sanctions [§ 11.48]
- Z. Exceptions in JIPS Cases [§ 11.49]
- AA. Role of Defense Counsel [§ 11.50]

V. CHIPS and UCHIPS Cases [§ 11.51]

- A. Dispositional Alternatives in CHIPS Cases and UCHIPS Cases Involving Child Expectant Mother [§ 11.52]
- B. Dispositional Alternatives in UCHIPS Cases Involving Adult Expectant Mother [§ 11.53]
- C. Duty to Warn [§ 11.54]
- D. Role of Defense Counsel [§ 11.55]

VI. Practice Forms [§ 11.56]

- A. Motion for Further Dispositional Study (Form CRM-0206) [§ 11.57]
- B. Motion for Alternative Disposition (Form CRM-0207) [§ 11.58]
- C. Notice and Motion to Review Dispositional Order (Form CRM-0208) [§ 11.59]
- D. Petition for a New Hearing (Form CRM-0209) [§ 11.60]
- E. Motion for Continuance (Form CRM-0210) [§ 11.61]

## VII. Standard Juvenile Court Forms [§ 11.62]

### Supplement Chapter 12

#### Postdispositional Proceedings

##### 12.1 Scope of Chapter

12.11 [Change in Placement] [Request by Party Responsible for Implementing Dispositional Order] [Placement of Delinquent Juveniles in Juvenile Correctional Facilities and Secured Residential Care Centers for Children and Youth] In General

12.21 [Change in Placement] Expiration of Change-in-Placement Order

12.29 [Extension of Dispositional Order] Hearing on Request for Extension

12.30 Permanency Hearing

12.39 Standard Juvenile Court Forms

### Chapter 12

#### Postdispositional Proceedings

##### I. Scope of Chapter [§ 12.1]

##### II. Nature of Postdispositional Hearings [§ 12.2]

##### III. Revision of Dispositional Order [§ 12.3]

##### IV. Change in Placement [§ 12.4]

###### A. In General [§ 12.5]

###### B. Request by Party Responsible for Implementing Dispositional Order [§ 12.6]

###### 1. CHIPS, UCHIPS, JIPS, and Delinquency Cases [§ 12.7]

a. Change in Placement from One Out-of-Home Placement to Another Out-of-Home Placement or to In-Home Placement [§ 12.8]

b. Change in Placement from In-Home Placement to Out-of-Home Placement [§ 12.9]

###### 2. Placement of Delinquent Juveniles in Juvenile Correctional Facilities and Secured Residential Care Centers for Children and Youth [§ 12.10]

a. In General [§ 12.11]

b. Departmental Review [§ 12.12]

c. Transfer to More Restrictive Placement [§ 12.13]

d. Transfer to Less Restrictive Placement [§ 12.14]

e. Release to Aftercare or Community Supervision [§ 12.15]

f. Revocation of Aftercare Supervision or Community Supervision [§ 12.16]

g. Length of Supervision [§ 12.17]

###### C. Request by Party Primarily Bound by Dispositional Order [§ 12.18]

###### D. Change-in-Placement Order [§ 12.19]

###### E. Hearing to Determine Permanency Plan [§ 12.20]

###### F. Expiration of Change-in-Placement Order [§ 12.21]

##### V. Extension of Dispositional Order [§ 12.22]

###### A. In General [§ 12.23]

B. Time Periods [§ 12.24]

C. Court Report Required [§ 12.25]

1. In General [§ 12.26]

2. Children Placed Outside Home [§ 12.27]

3. Children Not Placed Outside Home [§ 12.28]

D. Hearing on Request for Extension [§ 12.29]

VI. Permanency Hearing [§ 12.30]

VII. Serious Juvenile Offender Program [§ 12.31]

A. In General [§ 12.32]

B. Program Components [§ 12.33]

C. Discharge from Program [§ 12.34]

VIII. Duty to Warn in CHIPS, UCHIPS, JIPS, and Delinquency Cases [§ 12.35]

IX. Sexually Violent Person Commitments [§ 12.36]

X. Practice Form [§ 12.37]

A. Notice of Intent to Pursue Postdispositional Relief (Form CRM-0211) [§ 12.38]

XI. Standard Juvenile Court Forms [§ 12.39]

Supplement Chapter 13

Appeals

13.1 Scope of Chapter

Chapter 13

Appeals

I. Scope of Chapter [§ 13.1]

II. Final and Nonfinal Orders [§ 13.2]

III. Interlocutory Appeals [§ 13.3]

A. Procedure [§ 13.4]

B. Contents of Petition [§ 13.5]

C. Response to Petition [§ 13.6]

D. If Court Grants Review [§ 13.7]

E. Appealing Orders Waiving Juvenile Court Jurisdiction [§ 13.8]

1. In General [§ 13.9]

2. Timing of Appeal [§ 13.10]

3. Standard of Review [§ 13.11]

IV. Appeals of Final Orders [§ 13.12]

V. Appeals of Termination-of-Parental-Rights Orders [§ 13.13]

VI. Stays Pending Appeal [§ 13.14]

VII. Practice Forms [§ 13.15]

A. Standard Court Forms [§ 13.16]

B. Petition for Leave to Appeal a Nonfinal Order (Form JUV-0039) [§ 13.17]

Supplement Chapter 14

Waiver into Adult Court

14.1 Scope of Chapter

## 14.3 [Procedure] Nature and Subjects of Waiver Hearing

### Chapter 14

#### Waiver into Adult Court

##### I. Scope of Chapter [§ 14.1]

##### II. Procedure [§ 14.2]

###### A. Nature and Subjects of Waiver Hearing [§ 14.3]

###### B. Initiating Waiver Proceeding [§ 14.4]

###### 1. Filing Petition [§ 14.5]

###### 2. Contents of Petition [§ 14.6]

###### C. Hearing on Petition [§ 14.7]

###### 1. Time Periods [§ 14.8]

###### 2. Notice [§ 14.9]

###### 3. Discovery [§ 14.10]

###### 4. Type of Hearing Required [§ 14.11]

###### 5. Hearing When Juvenile Absconds [§ 14.12]

##### III. Prosecutive Merit [§ 14.13]

###### A. What Is Prosecutive Merit [§ 14.14]

###### B. Challenging Prosecutive Merit [§ 14.15]

##### IV. Decision to Waive Jurisdiction [§ 14.16]

###### A. In General [§ 14.17]

###### B. Waiver Criteria of Wis. Stat. § 938.18(5) [§ 14.18]

###### 1. In General [§ 14.19]

###### 2. Juvenile's Personality [§ 14.20]

###### 3. Prior Record [§ 14.21]

###### 4. Type and Seriousness of Offense [§ 14.22]

###### 5. Adequacy and Suitability of Resources in Juvenile System [§ 14.23]

###### 6. Desirability of One Trial [§ 14.24]

###### C. Alternatives to Waiver [§ 14.25]

###### D. The Decision to Grant or Deny Waiver [§ 14.26]

###### E. If Court Grants Waiver [§ 14.27]

##### V. Stipulating to Waiver [§ 14.28]

##### VI. Practice Form [§ 14.29]

###### A. Motion to Dismiss Defective Waiver Petition (Form CRM-0213) [§ 14.30]

##### VII. Standard Juvenile Court Forms [§ 14.31]

### Supplement Chapter 15

#### Confidentiality

##### 15.1 Scope of Chapter

##### 15.10 [Records] In General

##### 15.20 [Records] [Agency Records] In General

##### 15.43 [Records] [Court Records] Access by Foster Parents and Other Physical Custodians

##### 15.46 [Records] Medical Records: Test Results Under Wis. Stat. § 938.296

## Chapter 15

### Confidentiality

#### I. Scope of Chapter [§ 15.1]

#### II. Hearings [§ 15.2]

- A. Exclusion of CHIPS Child [§ 15.3]
- B. Exclusion of the Public [§ 15.4]
- C. Rights of Victims Under Wis. Stat. Ch. 938 [§ 15.5]
- D. News Media [§ 15.6]
- E. Foster Parents and Other Physical Custodians [§ 15.7]
- F. Other Persons Approved by the Court [§ 15.8]

#### III. Records [§ 15.9]

##### A. In General [§ 15.10]

##### B. Police Records [§ 15.11]

- 1. In General [§ 15.12]
- 2. Access by or with Permission of Child, Expectant Mother, Parent, Guardian, or Legal Custodian [§ 15.13]
- 3. Access by School Officials [§ 15.14]
- 4. Access by Victims Under Wis. Stat. Ch. 938 [§ 15.15]
- 5. Access by Fire Investigators [§ 15.16]
- 6. Traffic Violations [§ 15.17]

##### C. Department of Transportation Records [§ 15.18]

##### D. Agency Records [§ 15.19]

- 1. In General [§ 15.20]
- 2. Access by or with Permission of Child, Expectant Mother, Parent, Guardian, or Legal Custodian [§ 15.21]
- 3. Confidential Exchange of Information Between Agencies [§ 15.22]
- 4. Access by Department of Corrections [§ 15.23]
- 5. Records Relating to Juveniles Who Have Escaped from Certain Facilities, Centers, or Jails [§ 15.24]
- 6. Records Relating to Juveniles Alleged to Be Sexual Predators [§ 15.25]
- 7. Records Relating to Individuals Seeking Credentialing [§ 15.26]

##### E. Court Records [§ 15.27]

- 1. In General [§ 15.28]
- 2. Access by or with Permission of Child, Expectant Mother, Parent, Guardian, or Legal Custodian [§ 15.29]
- 3. Access by School Officials [§ 15.30]
- 4. Access by Victims [§ 15.31]
- 5. Access by Law Enforcement Agencies [§ 15.32]
- 6. Access by Fire Investigators [§ 15.33]
- 7. Access to Monitor Compliance with Federal Regulations [§ 15.34]
- 8. Access by Researchers [§ 15.35]
- 9. Access to Information for Firearms-Restrictions Record Search or Concealed-Weapon-License Background Check [§ 15.36]
- 10. Access Relating to Juveniles Alleged to Be Sexual Predators [§ 15.37]
- 11. Access Relating to Juveniles Required to Register as Sex Offenders [§ 15.38]
- 12. Access by Defense Counsel [§ 15.39]

13. Access by “the Requester” [§ 15.40]

14. Access Relating to Caregiver Background Checks [§ 15.41]

15. Traffic Violations [§ 15.42]

16. Access by Foster Parents and Other Physical Custodians [§ 15.43]

17. Other Court Proceedings [§ 15.44]

F. School Records [§ 15.45]

G. Medical Records: Test Results Under Wis. Stat. § 938.296 [§ 15.46]

IV. Sanctions for Disclosure of Information [§ 15.47]

V. Standard Juvenile Court Forms [§ 15.48]

Supplement Chapter 16

Contempt and Juvenile Sanctions

16.1 Scope of Chapter

16.9 [Juvenile Sanctions in Delinquency and JIPS Cases Under Wis. Stat. § 938.13(4), (6m), (7), (12), and (14)] [Defenses] Sanction to Secure Custody

16.23 [Contempt] [Defenses] Consideration of Less Restrictive Alternatives

16.27 Standard Juvenile Court Forms

Chapter 16

Contempt and Juvenile Sanctions

I. Scope of Chapter [§ 16.1]

II. Juvenile Sanctions in Delinquency and JIPS Cases Under Wis. Stat. § 938.13(4), (6m), (7), (12), and (14) [§ 16.2]

A. In General [§ 16.3]

B. Procedure [§ 16.4]

C. Defenses [§ 16.5]

1. Notice [§ 16.6]

2. Reasonableness of Conditions [§ 16.7]

3. Proof of Violation [§ 16.8]

4. Sanction to Secure Custody [§ 16.9]

5. Double Jeopardy [§ 16.10]

III. Sanctions for JIPS Cases Under Wis. Stat. § 938.13(6): Habitual Truants [§ 16.11]

IV. Short-Term Detention for Violation of Delinquency Order, Aftercare Supervision, or JIPS Order [§ 16.12]

V. Contempt [§ 16.13]

A. In General [§ 16.14]

B. To Compel Compliance with Dispositional Order [§ 16.15]

1. For Continued Violation of Order [§ 16.16]

2. Under Wis. Stat. Ch. 785 [§ 16.17]

a. In General [§ 16.18]

b. Types of Contempt Under Wis. Stat. Ch. 785 [§ 16.19]

c. Procedure for Remedial Contempt [§ 16.20]

d. Procedure for Punitive Contempt [§ 16.21]

C. Defenses [§ 16.22]

1. Consideration of Less Restrictive Alternatives [§ 16.23]

2. Length of Jail Time Excessive [§ 16.24]

3. Nature of Contempt Action [§ 16.25]

4. Reasonableness of Purge Condition [§ 16.26]

## VI. Standard Juvenile Court Forms [§ 16.27]

### Supplement Chapter 17

#### Termination of Parental Rights

##### 17.1 Scope of Chapter

##### 17.3 [Nature of Termination Proceedings] In General

##### 17.7 [Nature of Termination Proceedings] [Rights of Parents in TPR Proceedings] Right to Counsel

##### 17.12 [Nature of Termination Proceeding] [Rights of Parents in TPR Proceedings] Burden of Proof

##### 17.17 [Grounds for Termination of Parental Rights] Relinquishment

##### 17.26 [Grounds for Termination of Parental Rights] Commission of a Felony Against a Child

##### 17.30 [Procedure] Filing the Petition

##### 17.37 [Procedure] Time Periods

##### 17.42 [Procedure] [Initial Hearing on Petition] Admission to the Petition

##### 17.50 [Procedure] [Fact-Finding Hearing] [Rules of Civil Procedure in Juvenile Court Proceedings] Default for Failure to Appear

##### 17.52 [Procedure] [Fact-Finding Hearing] Finding of Unfitness

##### 17.54 [Procedure] [Disposition] In General

##### 17.55 [Procedure] [Disposition] Standard and Factors Considered

##### 17.59 [Procedure] [Disposition] [Decision by the Court] Termination of Parental Rights

##### 17.62 Voluntary Termination of Parental Rights

##### 17.64 [Termination of Parental Rights Under the Indian Child Welfare Act] In General

### Chapter 17

#### Termination of Parental Rights

##### I. Scope of Chapter [§ 17.1]

##### II. Nature of Termination Proceedings [§ 17.2]

###### A. In General [§ 17.3]

###### B. Civil Versus “Quasi-Criminal” [§ 17.4]

###### C. Rights of Parents in TPR Proceedings [§ 17.5]

###### 1. In General [§ 17.6]

###### 2. Right to Counsel [§ 17.7]

###### 3. Right to Jury Trial [§ 17.8]

###### 4. Right Against Self-Incrimination [§ 17.9]

###### 5. Right to Cross-examine Witnesses [§ 17.10]

###### 6. Right to Present Evidence [§ 17.11]

###### 7. Burden of Proof [§ 17.12]

###### 8. Substitution of Judge [§ 17.13]

##### III. Grounds for Termination of Parental Rights [§ 17.14]

###### A. In General [§ 17.15]

###### B. Abandonment [§ 17.16]

###### C. Relinquishment [§ 17.17]

###### D. Continuing Need of Protection or Services [§ 17.18]

- E. Continuing Parental Disability [§ 17.19]
- F. Continuing Denial of Periods of Physical Placement or Visitation [§ 17.20]
- G. Child Abuse [§ 17.21]
- H. Failure to Assume Parental Responsibility [§ 17.22]
- I. Incestuous Parenthood [§ 17.23]
- J. Homicide or Solicitation to Commit Homicide of Parent [§ 17.24]
- K. Parenthood as a Result of Sexual Assault [§ 17.25]
- L. Commission of a Felony Against a Child [§ 17.26]
- M. Prior Termination of Parental Rights to Another Child [§ 17.27]

#### IV. Procedure [§ 17.28]

- A. In General [§ 17.29]
- B. Filing the Petition [§ 17.30]
- C. Notice [§ 17.31]
  - 1. In General [§ 17.32]
  - 2. Who Must Be Served [§ 17.33]
  - 3. Others Entitled to Notice [§ 17.34]
  - 4. Contents of Summons [§ 17.35]
  - 5. Service by Publication [§ 17.36]
- D. Time Periods [§ 17.37]
- E. Initial Hearing on Petition [§ 17.38]
  - 1. In General [§ 17.39]
  - 2. Court Report [§ 17.40]
  - 3. Determining Paternity [§ 17.41]
  - 4. Admission to the Petition [§ 17.42]
- F. Fact-Finding Hearing [§ 17.43]
  - 1. In General [§ 17.44]
  - 2. Rules of Evidence at Trial [§ 17.45]
  - 3. Rules of Civil Procedure in Juvenile Court Proceedings [§ 17.46]
    - a. In General [§ 17.47]
    - b. Summary Judgment [§ 17.48]
    - c. Stipulation to an Element [§ 17.49]
    - d. Default for Failure to Appear [§ 17.50]
  - 4. Role of the Guardian ad Litem [§ 17.51]
  - 5. Finding of Unfitness [§ 17.52]
- G. Disposition [§ 17.53]
  - 1. In General [§ 17.54]
  - 2. Standards and Factors Considered [§ 17.55]
  - 3. Procedures at Hearings [§ 17.56]
  - 4. Decision by the Court [§ 17.57]
    - a. Dismissing the Petition [§ 17.58]
    - b. Termination of Parental Rights [§ 17.59]



## 5. Dispositional Orders [§ 17.60]

## V. Role of Defense Counsel [§ 17.61]

## VI. Voluntary Termination of Parental Rights [§ 17.62]

## VII. Termination of Parental Rights Under the Indian Child Welfare Act [§ 17.63]

### A. In General [§ 17.64]

### B. Jurisdiction [§ 17.65]

### C. Additional Proof and Burden-of-Proof Issues [§ 17.66]

#### 1. In General [§ 17.67]

#### 2. Active Efforts [§ 17.68]

#### 3. Qualified Expert Witnesses [§ 17.69]

## VIII. Standard Juvenile Court Forms [§ 17.70]

## Supplement Chapter 18

## Parental Consent for Minor's Abortion

### 18.1 Scope of Chapter

### 18.2 History

### 18.14 Other Abortion-Related Prohibitions

### 18.19 Standard Juvenile Court Forms

## Chapter 18

## Parental Consent for Minor's Abortion

### I. Scope of Chapter [§ 18.1]

### II. History [§ 18.2]

### III. Circuit Court Procedure [§ 18.3]

#### A. Consent [§ 18.4]

#### B. Judicial Waiver of Consent Requirement [§ 18.5]

##### 1. Filing Petition [§ 18.6]

##### 2. Right to Counsel [§ 18.7]

##### 3. Initial Appearance [§ 18.8]

##### 4. Hearing on Petition [§ 18.9]

##### 5. Determination [§ 18.10]

##### 6. Notification and Delivery of Order [§ 18.11]

#### C. Failure of Court to Act Within Applicable Time Periods [§ 18.12]

#### D. Fees and Costs [§ 18.13]

### IV. Other Abortion-Related Prohibitions [§ 18.14]

### V. Appeals [§ 18.15]

#### A. Court of Appeals [§ 18.16]

#### B. Supreme Court [§ 18.17]

#### C. Persons Barred from Appellate Proceedings [§ 18.18]

## VI. Standard Juvenile Court Forms [§ 18.19]

## Supplement Chapter 19

## Uniform Child Custody Jurisdiction and Enforcement Act

### 19.1 What the Uniform Child Custody Jurisdiction and Enforcement Act Is

## Chapter 19

### Uniform Child Custody Jurisdiction and Enforcement Act

#### I. What the Uniform Child Custody Jurisdiction and Enforcement Act Is [§ 19.1]

#### II. Jurisdiction Under the UCCJEA [§ 19.2]

##### A. Initial Child Custody Jurisdiction [§ 19.3]

##### B. Exclusive, Continuing Jurisdiction [§ 19.4]

##### C. Jurisdiction to Modify Determination [§ 19.5]

##### D. Temporary Emergency Jurisdiction [§ 19.6]

#### III. Declining Jurisdiction [§ 19.7]

##### A. Inconvenient Forum [§ 19.8]

##### B. Jurisdiction Declined by Reason of Conduct [§ 19.9]

#### IV. Procedure [§ 19.10]

##### A. Information Submitted to the Court [§ 19.11]

##### B. Appearance of Parties and Child [§ 19.12]

##### C. Simultaneous Proceedings [§ 19.13]

#### V. Enforcement [§ 19.14]

##### A. Duty to Enforce [§ 19.15]

##### B. Registration of Child Custody Determination [§ 19.16]

##### C. Expedited Enforcement of Child Custody Determination [§ 19.17]

##### D. Warrant to Take Physical Custody of Child [§ 19.18]

#### VI. Conclusion [§ 19.19]

#### VII. Standard Juvenile Court Forms [§ 19.20]

#### Appendices

#### Appendix A

#### Chart

#### Appendix B

#### Lists of Standard Juvenile Court Forms

#### Forms Index

#### Subject Index

#### Supplement Subject Index

# Wisconsin Juvenile Law Handbook

## Fifth Edition

[\\*Includes 2024–25 Supplement](#)

Katie York  
 Alaina Fahley  
 Jessica Fehrenbach  
 Eileen Fredericks  
 Matthew W. Giesfeldt  
 Imani Hollie  
 Faun Moses  
 Elisabeth Stockbridge  
 Jacob Van Kerkvoorde

#### Authors of Previous Editions

|                        |                       |
|------------------------|-----------------------|
| Milton Childs          | Virginia A. Pomeroy   |
| Andrea Taylor Cornwall | Gina M. Pruski        |
| Shelley M. Fite        | Mackenzie Renner      |
| Margaret Johnson       | Diane Rondini-Harness |
| Kellie M. Krake        | Amanda Skorr          |
| Jean M. LaTour         | Melinda Swartz        |
| Devon Lee              | Mary A. Wolfe         |
| Eryn Menden            | David Zerwick         |
| Janice P. Pasaba       |                       |



To order, call (800) 728-7788 (nationwide)  
 or (608) 257-3838 (Madison area)

State Bar of Wisconsin  
 5302 Eastpark Blvd., Madison, WI 53718  
<https://www.wisbar.org>

© 2022, 2024 by the State Bar of Wisconsin  
 All rights reserved  
 First edition published 1996. Second edition 2004.  
 Third edition 2010. Fourth edition 2017.  
 Printed in the United States of America  
 26 25 24 23 22 5 4 3 2 1  
 ISBN 978-1-57862-648-9  
 Library of Congress Control Number: 2022951414  
 Product Code AK0062  
 Also available online  
 Formatted for a 2.5" binder

#### *A Cautionary Note*

This book is presented with the understanding that the publisher does not render any legal, accounting, or other professional service. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, anyone using this material must always research original sources of authority and update this information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the State Bar of Wisconsin be liable for any direct, indirect, or consequential damages resulting from the use of this material.

---

## Summary of Developments

---

### *New Developments Reported in the 2024–25 Supplement*

The 2024–25 supplement to the *Wisconsin Juvenile Law Handbook* reflects legal developments since publication of the 2022–23 revision. In particular, the 2024–25 supplement includes discussions of the following:

In a 2024 opinion, the Wisconsin Court of Appeals reviewed a circuit court order denying a juvenile’s motion to suppress allegedly involuntary statements made during custodial interrogations by law enforcement officers. *See* Supp. ch. 1.

The state of Wisconsin has continued to take steps to replace the Lincoln Hills and Copper Lake Schools. *See* Supp. ch. 1; Supp. § 16.9. In the interim, in a 2023 unpublished opinion, the Wisconsin Court of Appeals addressed whether a court could lawfully place juveniles in these facilities under the serious juvenile offender program (SJOP) statute even though the Type 1 juvenile correctional facilities no longer exist in a legal sense. *See* Supp. §§ 11.25, 11.26, 11.41, 12.11.

The Wisconsin Legislature extended, until June 30, 2025, a pilot program that authorizes the State Public Defender (SPD) to appoint attorneys in five counties to represent indigent parents in cases involving children in need of protection or services (CHIPS). *See* Supp. ch. 1; Supp. §§ 2.14, 3.2.

The legislature has enacted legislation that creates a new out-of-home care placement option with a person who is “like-kin.” *See* Supp. ch. 1; Supp. §§ 5.4, 11.10, 11.14, 11.21, 11.26, 11.52, 12.21, 12.29, 12.30, 15.20, 15.43, 15.46, 17.59.

The Wisconsin Court of Appeals issued unpublished opinions in 2022, 2023, and 2024 that discussed the circuit court’s use of default judgment as a sanction for a parent who fails to appear personally at a court-ordered hearing in a termination-of-parental-rights (TPR) proceeding. *See* Supp. §§ 2.13, 17.50.

The Wisconsin Supreme Court issued an opinion in 2024 in which it declined to determine the applicable burden of proof at the disposition phase of a TPR proceeding, but it accepted a petition for review in a case in which the court is likely to resolve that issue during the court’s 2024–25 term. *See* Supp. §§ 2.29, 2.31, 17.12, 17.42, 17.54, 17.55. In 2023, the supreme court had also issued a fractured decision on a related issue. *See* Supp. §§ 17.12, 17.42, 17.54, 17.55.

The legislature passed an act concerning safety devices for newborn infants (“baby boxes”) under the safe-haven law for relinquishing custody of a newborn. *See* Supp. §§ 4.25, 7.19, 11.10, 17.17.

The U.S. District Court for the Western District of Wisconsin, in a 2022 opinion, considered whether the U.S. Constitution limits the authority of the Wisconsin Parole Commission to grant or deny parole to incarcerated individuals who committed crimes as juveniles. *See* Supp. § 4.17.

The legislature reorganized the crimes commonly known as “carjacking,” and corresponding references have been updated to reflect the renumbering. *See* Supp. §§ 5.15, 5.42, 11.26, 11.41.

Supplement section 6.3 adds a citation to a resource, updated in 2024, that discusses the growing trend in the United States to divert youth from the juvenile justice system. *See* Supp. § 6.3.

The Wisconsin Supreme Court, in 2023, considered whether it should overrule prior cases that had permitted criminal defendants to seek in camera review of a victim’s privately held, privileged health-care records. *See* Supp. §§ 9.7, 9.34, 15.20.

Chapter 9 contains a revised discussion about motions to suppress a juvenile’s confession. *See* Supp. § 9.47.

The legislature has modified the list of offenses for which a juvenile’s violation will require the juvenile to register as a Wisconsin sex offender. *See* Supp. § 11.45.

In a 2024 opinion, the Wisconsin Supreme Court considered whether, after finding that a parent’s failure to appear at a hearing in the grounds phase of a TPR proceeding was “egregious and without clear and justifiable excuse,” the circuit court needed to wait at least two days before proceeding to a dispositional hearing and, if so, whether the circuit court lacked competency to conduct the dispositional hearing by failing to wait two days. *See* Supp. §§ 17.7, 17.37, 17.50.

In an opinion published in 2023, the Wisconsin Court of Appeals discussed whether a parent’s conviction for neglect of a child resulting in death as a party to the crime qualified as a serious felony, establishing a ground for terminating that parent’s parental rights. *See* § 17.26.

In 2023 opinion, the Wisconsin Court of Appeals considered whether a nonprosecution agreement requiring the voluntary termination of parental rights violated public policy. *See* Supp. §§ 17.42, 17.62.

In 2023, the U.S. Supreme Court considered a challenge to the Indian Child Welfare Act. *See* Supp. § 17.64.

As of the publication of the 2024–25 supplement to the *Wisconsin Juvenile Law Handbook*, the Wisconsin Supreme Court was reviewing a Dane County Circuit Court holding that a Wisconsin criminal statute enacted in 1849 did not apply to consensual abortions. *See* Supp. §§ 18.1, 18.2, 18.14.

### *Developments Previously Reported in the 2022–23 Revision*

The fifth edition of the *Wisconsin Juvenile Law Handbook* integrated the legal developments that were reported on separate supplement pages in 2018 and 2020. In addition, this edition expanded discussions throughout the book to reflect changes occurring in juvenile law since publication of the 2020–21 supplement.

Wisconsin’s Type 1 juvenile correctional facilities—Lincoln Hills School and Copper Lake School—did not close in 2021, as the Wisconsin Legislature had directed they should, but the legislature later authorized funding for a new secure youth facility in Milwaukee County. As of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, that facility is still in the development-and-approval stage. *See* ch. 1; §§ 3.11, 5.4, 11.25, 11.26, 12.11, 12.15, 14.23, 16.9.

The legislature extended, until June 30, 2023, a pilot program that authorizes the SPD to appoint attorneys in five counties to represent indigent parents in CHIPS cases. *See* ch. 1; §§ 2.14, 3.2.

In 2021, the legislature created the concept of a “qualified residential treatment program” (QRTP) in Wisconsin law. The new statutory provisions are consistent with the federal Family First Prevention Services Act of 2018, under which a state can qualify for reimbursement of QRTP placement costs via federal funds under Title IV-E of the Social Security Act only if the placement satisfies specific requirements, including a standardized assessment by a “qualified individual” and certain judicial findings. *See* ch. 1; §§ 5.21, 5.38, 8.24, 8.35, 11.10, 11.14, 11.21, 12.8, 12.9, 12.11, 12.18, 12.19, 12.30.

In 2022, the legislature enacted legislation that changed the circumstances under which courts can conduct proceedings via telephone or live audiovisual means in cases under [Wis. Stat.](#) ch. 938. *See* ch. 1; §§ 8.6, 10.9, 16.4.

In 2020, the Wisconsin Court of Appeals issued an opinion in which it discussed potential in camera inspections of crime victims’ health-care records in the wake of the Marsy’s Law amendment (concerning victims’ rights) to the Wisconsin Constitution. The Wisconsin Supreme Court has granted review. *See* §§ 3.7, 9.7. New discussions of Marsy’s Law have also been added to sections 10.7 and 15.5.

The *Juvenile Law Handbook*’s discussions of waiver of parental consent for abortion have been updated to acknowledge that Wisconsin courts have not resolved whether Wisconsin’s statutory ban on abortion is enforceable since the U.S. Supreme Court overturned *Roe v. Wade* in 2022. *See* §§ 4.30, 18.1, 18.2, 18.14, 18.19.

The Wisconsin Supreme Court issued an order, effective July 1, 2022, that added provisions to the Wisconsin Statutes to regulate the use of physical restraints on children in court during proceedings under the Children’s Code and Juvenile Justice Code. *See* §§ 8.5, 16.4.

The Wisconsin Court of Appeals, in 2021, considered whether confidential reporters’ statements to child protective services staff about a child’s well-being were admissible as nontestimonial hearsay in a prosecution for causing mental harm to the child. *See* § 10.14.

In 2021, the Wisconsin Legislature enacted Ethan’s Law, which limits a child’s out-of-home placement with an individual who has been convicted of, pleaded no contest to, or had a charge dismissed or amended as the result of a plea agreement for certain crimes. *See* §§ 11.26,

11.52.

The Wisconsin Supreme Court approved amendments to the procedures for electronic filing of documents under the Wisconsin Rules of Appellate Procedure. *See* §§ 13.4, 13.13.

In 2021, the Wisconsin Supreme Court decided a case in which it accepted review of a court of appeals' denial of a petition for permissive appeal. *See* § 13.7.

In a 2022 decision, the Wisconsin Supreme Court reviewed a juvenile court's denial of a petition to waive a juvenile into adult court. *See* §§ 13.11, 14.15.

In a 2022 unpublished opinion, the Wisconsin Court of Appeals addressed a father's challenge to a circuit court's decision to terminate his parental rights instead of ordering guardianship as an alternative. *See* § 17.54.

---

## Foreword

---

The *Wisconsin Juvenile Law Handbook* exists because of the authors' dedicated efforts and the organizational support in the Office of the State Public Defender that encouraged those efforts, even in the face of extraordinary challenges.

At about the time that the original *Juvenile Law Handbook* manuscript was going to be finalized, in 1995, the authors faced an unexpected publishing obstacle: the Wisconsin Legislature's adoption of the new Wisconsin Juvenile Justice Code, Wis. Stat. ch. 938, with an effective date of July 1, 1996. Then, in the spring of 1996, the legislature passed more than 15 additional acts that affected Wis. Stat. ch. 48 or 938 or both. As attorneys around the state wondered how to interpret the changes and how everyday practice would be affected, coauthors Virginia Pomeroy and Gina Pruski tirelessly rewrote the *Handbook*, revising chapters each time a new statutory section was created or an existing one amended. The book was difficult enough to write once, but the authors essentially wrote it twice for the first edition: one time under the old law, and a second time under the new.

In the years since the *Juvenile Law Handbook* was first published, the legislature has continued to refine and expand the Children's Code and the Juvenile Justice Code (and the courts have continued to interpret them), and these developments eventually prompted plans for the second edition of this book. Virginia Pomeroy and Gina Pruski again dove into the task of revising the *Juvenile Law Handbook* with the same energy they had devoted to the original book. This time, however, a different challenge faced them. Virginia, who had fought numerous fights on behalf of children throughout her legal career, was unable to win her own battle—against cancer; she passed away on March 21, 2004. The *Juvenile Law Handbook* nonetheless continues to bear Virginia's thoughtful and compassionate imprint, and we are grateful for Virginia's legacy.

In 2022, the State Bar of Wisconsin is pleased to publish another revision of this respected resource—now in its fifth edition—written by a new lead author, Katie York, and a team of coauthors from the Office of the State Public Defender. On behalf of the State Bar and the children who will be served by this practical guide, we express our deep appreciation to the Office of the State Public Defender for their continuing support of this joint endeavor and to the authors of this new edition for their tremendous investment in this project.

We also wish to acknowledge the contributions of the State Bar staff who participated in this publication: Hana Miura, who managed and edited the revision; Lana Ferstl, who coordinated the production of the revision in preparation for publication; and Margie DeWind, Dean Hunter, Kristi Lemanski, and Carolyn Schwerman, who read through the chapters in their final stages of editing.

CAROL CHAPMAN, ESQ.  
PUBLICATIONS MANAGER  
STATE BAR OF WISCONSIN

---

## Preface

---

In 2004, the juvenile justice system lost a champion when Virginia Pomeroy, author of the first edition of the *Wisconsin Juvenile Law Handbook*, lost a lengthy battle with breast cancer. Virginia, a long-time advocate at the trial and appellate level for children and juvenile law issues, wrote the first edition of this book in 1995–96, as Wisconsin’s juvenile justice system implemented a new Juvenile Justice Code. Through this book, assisted by Gina M. Pruski as her coauthor, along with contributing authors Ann Jacobs and Evelyn Mazack and the invaluable wisdom and insight of Eileen Hirsch, Virginia transferred to future generations of Wisconsin lawyers her commitment to upholding the awesome responsibility of advocating for children.

Continuing in this commitment, the fifth edition of the *Juvenile Law Handbook*, like the previous editions and updates, reflects the hard work and experience of many attorneys from the Office of the State Public Defender (SPD). Special thanks to Eileen Fredericks, Jessica Fehrenbach, Faun Moses, Alaina Fahley, Imani Hollie, Matthew Giesfeldt, Elisabeth Stockbridge, and Jacob Van Kerkvoorde for their work as coauthors of the fifth edition. Thanks also to State Public Defender Kelli Thompson, former State Public Defender Nicholas Chiarkas, and the entire Agency Leadership Team of the SPD for encouraging and supporting this project.

Finally, special gratitude goes to all the Wisconsin lawyers who have continued to uphold the awesome responsibility of advocating for children. Your passion and dedication are truly inspiring.

—KATIE YORK

---

## About the Authors

---

[Katie York](#) has been the Deputy State Public Defender for the Wisconsin State Public Defender (SPD) since 2023. Katie started with the SPD as an assistant state public defender in the Green Bay trial office, where she handled nearly all SPD case types. In 2010, she transferred to the SPD’s Madison appellate office where she was later promoted to local attorney manager. In 2018, she became the SPD’s deputy trial division director, and in 2019, she returned to the appellate division as the SPD’s appellate division director.

[Alaina Fahley](#) has been with Office of the Wisconsin State Public Defender (SPD) since August 2013 and works in the Appleton trial office, serving youth and parents in counties throughout northeastern Wisconsin, especially in children in need of protection and services (CHIPS) and termination-of-parental-rights (TPR) litigation, and serves as the agency's Family Defense Practice Coordinator. She received her B.A. in social welfare and justice from Marquette University in 2010 and her J.D. from Marquette University in 2013. During her time at the SPD, she has presented at annual trainings to certify staff and private bar attorneys to take youth defense and family defense cases. She has served two separate terms as the chair of the Children and the Law Section of the State Bar of Wisconsin. She has given numerous training sessions on issues related to youth and family defense issues: she has presented at the State Bar’s Annual Meeting & Conference and the Conference on Child Welfare and the Courts, and she has also trained attorneys in other states. She has authored several articles related to child welfare and juvenile justice issues and is a 2024 Ambassador for Racial Justice through the Gault Center and the Georgetown Juvenile Justice Initiative.

[Jessica Fehrenbach](#) is a local attorney manager for the Office of the Wisconsin State Public Defender in Merrill. She earned her undergraduate degree at the University of Wisconsin-Green Bay and her law degree at Drake Law School. Jessica is a certified Youth Defender Advocacy Program trainer. Her experience of more than 13 years as a public defender has allowed her to represent hundreds of youth in rural northern Wisconsin counties. Jessica also serves on the MAC Homes Board, volunteers with Backpacks for Kids, and is vice president of a parent teacher organization.

[Eileen Fredericks](#) has been a staff attorney in the Madison trial office of the Wisconsin State Public Defender (SPD) in the youth defense unit since 2009. In addition, she is the youth defense practice coordinator for the SPD. In this position, she helps with trainings related to juvenile law and is available as a resource to all attorneys taking juvenile cases around the state. Eileen has previously worked in the SPD’s Milwaukee youth and mental health office and the SPD’s Kenosha office. She graduated from the University of Notre Dame and attended the University of Wisconsin Law School hoping to become a lawyer for children and teens. While attending law school, Eileen also earned her master’s degree in social work to better understand the needs and struggles of many of the people she represents and to learn how better to assist people in coping with life’s troubles. She is the 2023 recipient of the SPD’s Chiarkas Award for her contributions to creating a more just legal system for youth in Wisconsin.

[\*\*Matthew W. Giesfeldt\*\*](#) was an assistant state public defender with the Office of the Wisconsin State Public Defender (SPD) from 2015 to 2024, when he became an assistant federal defender for Federal Defender Services of Wisconsin. He worked in the juvenile unit of the SPD's Madison trial office for seven years, and thereafter, he worked in the SPD's Madison appellate office. He was also the SPD's family defense practice coordinator, assisting private bar and SPD attorneys statewide with cases regarding children in need of protection or services (CHIPS) and termination of parental rights (TPR). He is a founder and board member of the Student Expulsion Prevention Project. He has given more than 115 legal trainings to lawyers, judges, social workers, law enforcement officers, law students, and other individuals. He taught graduate-level classes at the University of Wisconsin-Madison's School of Education (legal rights and responsibilities for teachers). In 2009, he formed a 501(c)(3) organization, the Mama Goose Memorial Run/Walk, which has raised funds for cancer research.

[\*\*Imani Hollie\*\*](#) is a staff attorney with the Illinois Prison Project. She was formerly an assistant state public defender in Green Bay, Wisconsin, specializing in youth delinquency, child protection, and emerging adult criminal cases. Originally from Los Angeles, California, Imani is an alumna of Loyola University Chicago School of Law. Imani was a law clerk at the office of the Cook County Public Defender in the juvenile justice division. She also interned for Lawndale Christian Legal Center, a nonprofit organization located on the west side of Chicago, where she represented youth in juvenile delinquency proceedings. Additionally, Imani represented students in suspension, expulsion, and individualized education program (IEP) meetings as a student-advocate for Loyola's SUFEO (Stand Up For Each Other!), a student-run organization that provides free information and services for kindergarten through 12th-grade students facing suspension, bullying, or exclusion from school. Imani is the associate director of professional identity formation at Loyola University Chicago School of Law, teaching a diversity, inclusion, and equity course to first-year law students.

[\*\*Faun Moses\*\*](#) joined the Office of the Wisconsin State Public Defender (SPD) in 2010 as an assistant state public defender in the SPD's Madison appellate office. In 2015, Faun started working in the SPD's Janesville trial office as a local attorney manager and was promoted to regional attorney manager of the Janesville region in 2017. In 2023, Faun became the appellate division director.

[\*\*Elisabeth Stockbridge\*\*](#) is an assistant state public defender in the Wisconsin State Public Defender's Shawano trial office, where she represents juveniles in delinquency cases and children and parents in children in need of protection or services and termination-of-parental-rights cases. Attorney Stockbridge is certified as a youth defense advocacy trainer by the Gault Center and has trained youth defense attorneys across the state. Before joining the State Public Defender, Attorney Stockbridge clerked for the eight judges in the Brown County Circuit Court for two years. She is a 2009 graduate of the University of Wisconsin Law School.

[\*\*Jacob Van Kerkvoorde\*\*](#) is the local attorney manager in the Dodge County office of the Wisconsin State Public Defender. He earned his undergraduate degree in legal studies and sociology from the University of Wisconsin-Madison and his law degree from Loyola University Chicago School of Law, where he was a ChildLaw Fellow at the Civitas ChildLaw Center. Jacob previously worked as a staff attorney in the Sheboygan office of the State Public Defender.

### Authors of Previous Editions

Milton Childs  
 Andrea Taylor Cornwall  
 Shelley M. Fite  
 Margaret Johnson  
 Kellie M. Krake  
 Jean M. LaTour  
 Devon Lee  
 Eryn Menden  
 Janice P. Pasaba  
 Virginia A. Pomeroy  
 Gina M. Pruski  
 Mackenzie Renner  
 Diane Rondini-Harness  
 Amanda Skorr  
 Melinda Swartz  
 Mary A. Wolfe  
 David Zerwick

---

## About the Supplement Authors

---



**Ben Gonring** graduated with high honors from the University of Notre Dame in May 1993, earning a B.A. in government. He received his J.D. from the University of Wisconsin Law School, graduating with honors in December 1995. Admitted to the State Bar of Wisconsin in January 1996, he began working for the Office of the Wisconsin State Public Defender (SPD) in June of the same year. He was honored with the SPD's Outstanding Achievement Award in November 1997 and later with induction into the Rubin Society for "outstanding contribution to the community." In 2005, he was given Dane County's Competency Builder Award, presented for "years of service and dedication to the kids and families of Dane County." He was presented in 2009 with the Ervin Bruner Award, given annually to someone in Dane County who has made "substantial contributions to juvenile justice" over their career. In 2018, the *Wisconsin Law Journal* named him a "Leader in the Law." He has four times been named by *Madison Magazine* as one of Dane County's top lawyers in juvenile law. Representing children in both delinquency and protective services cases, as well as parents in termination-of-parental-rights cases, he has worked in the juvenile unit of the Madison trial office his entire career and has been the head of that unit since 2009.

**Kat Holloway** is a staff attorney with the Wisconsin State Public Defender's Office (SPD) at the youth and mental health office in Milwaukee. Before joining the agency, she graduated from the University of Wisconsin Law School. She previously interned with the Legal Assistance to Incarcerated People clinic, providing postconviction relief to incarcerated clients. She interned with the SPD at the youth and mental health office in Milwaukee and the appellate office in Madison. She has previously worked on projects studying the roles of police in the community and published *Consequences of Police in Schools: The Criminalization of Children in an Era of Mass Incarceration* with the *UC Law Journal of Race and Economic Justice*. As a staff attorney, she provides legal representation for children in delinquency and child welfare cases, and she also represents adults in termination-of-parental-rights cases.

**Katie Holtz** is a local attorney manager in the Milwaukee youth and mental health office of the Wisconsin State Public Defender (SPD). She began there working as an intern and has continued to represent and advocate for youth, parents, and individuals with mental illness. Katie, a Wisconsin native, earned an undergraduate degree from the College of William and Mary and returned to Wisconsin, eventually attending the University of Wisconsin Law School. Before working for the SPD, Katie was a clinical instructor at the University of Wisconsin Law School's Frank J. Remington Center, where she supervised students representing incarcerated individuals in Wisconsin's prisons and defendants on criminal appeals.

**Devon Lee** is an assistant state public defender in the appellate division of the Wisconsin State Public Defender (SPD). She started with the SPD in 2001, representing youth in the juvenile unit of the Madison trial office, transferred to the SPD's appellate division, and later served in the SPD's administration as the agency's legal counsel. From 2020 to 2024, she worked as a child welfare attorney at the Wisconsin Department of Children and Families.

---

## Editorial Review Board—1996 Edition

---

**Hon. Carl Ashley**  
Milwaukee County Circuit Court  
Milwaukee

**Richard J. Auerbach**  
Auerbach & Porter, S.C.  
Madison

**Kathryn C. Bach**  
Milwaukee

**Sally Barrientes**  
Milwaukee

**Colleen Bradley**

**Hon. Richard S. Brown** (retired)  
Ponte Vedra Beach, Florida

**Ann V. Davey**

St. Paul, Minnesota

**Patrick J. Devitt**

Milwaukee

**Thomas E. Dixon, Jr.**

Madison

**Lindsey D. Draper**

Milwaukee

**Therese A. Durkin**

Department of Children and Families

Madison

**Mary Ann Horky**

**Stephen P. Hurley**

Hurley Burish, S.C.

Madison

**Ann S. Jacobs**

Jacobs Injury Law, S.C.

Milwaukee

**V. Alan Johnson**

Manitowoc

**H. Elizabeth Kennebeck**

Madison

**Sheila J. Kessler**

Kessler & Greer Law Office

Stevens Point

**Jane E. Kohlwey**

Rio

**Michele M. LaVigne**

Madison

**Charles W. Mentkowski**

(deceased)

**Paul C. Merkle, Jr.**

Beloit

**Hon. Gregory A. Peterson** (retired)

Eau Claire

**Dennis G. Purtell**

Waterford

**Barbara A. Reinhold**

Pewaukee

**Lois E. Rentmeester**

Sun Prairie

**Peter J. Rubin**  
(deceased)

**Dana Miller Smetana**  
Eau Claire

**Sandra M. Sobocinski**  
Goodyear, Arizona

**Eric D. Steele**  
Milwaukee

**Stephanie C. Stoltman**  
Law Office of Stephanie C. Stoltman  
Cortaro, Arizona

**Charles B. Vetzner**  
Madison

**David N. Zerwick**  
Wauwatosa

---

## How to Cite This Book

---

**Cite this book in briefs and legal memoranda as:**

Katie York et al., *Wisconsin Juvenile Law Handbook* (5th ed. 2022).

[See *The Bluebook: A Uniform System of Citation* R. 15, B15.1 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).]

**After the first full citation, you may cite this book as:**

*Wisconsin Juvenile Law Handbook*, *supra*, § \_\_\_\_.

[See *The Bluebook: A Uniform System of Citation* R. 4.2(a), 15.10, B15.2 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).]

---

## Access to Downloadable Forms

---

To access your downloadable forms, please [click here](#).

---

## Summary of Contents

---

[Table of Contents](#)

[1 Introduction](#)

[2 Rights of Children, Parents, and Expectant Mothers](#)

[3 Roles of the Parties in Juvenile Court](#)

[4 Jurisdiction and Venue](#)

[5 Physical Custody](#)

[6 Intake Inquiry](#)

[7 Filing of a Petition \(CHIPS, UCHIPS, JIPS, and Delinquency Cases\)](#)

[8 Plea Hearing](#)

[9 Discovery and Other Motion Practice](#)

[10 Fact-Finding Hearing](#)

[11 Dispositional Hearing](#)

[12 Postdispositional Proceedings](#)

[13 Appeals](#)

[14 Waiver into Adult Court](#)

[15 Confidentiality](#)

[16 Contempt and Juvenile Sanctions](#)

[17 Termination of Parental Rights](#)

[18 Parental Consent for Minor's Abortion](#)

[19 Uniform Child Custody Jurisdiction and Enforcement Act](#)

[Appendices](#)

[Forms Index](#)

[Subject Index](#)

---

## Table of Contents

---

### [CHAPTER 1](#)

#### [INTRODUCTION](#)

### [CHAPTER 2](#)

#### [RIGHTS OF CHILDREN, PARENTS, AND EXPECTANT MOTHERS](#)

### [CHAPTER 3](#)

## [ROLES OF THE PARTIES IN JUVENILE COURT](#)

### [CHAPTER 4](#) [JURISDICTION AND VENUE](#)

### [CHAPTER 5](#) [PHYSICAL CUSTODY](#)

### [CHAPTER 6](#) [INTAKE INQUIRY](#)

### [CHAPTER 7](#) [FILING OF A PETITION \(CHIPS, UCHIPS, JIPS, AND DELINQUENCY CASES\)](#)

### [CHAPTER 8](#) [PLEA HEARING](#)

### [CHAPTER 9](#) [DISCOVERY AND OTHER MOTION PRACTICE](#)

### [CHAPTER 10](#) [FACT-FINDING HEARING](#)

### [CHAPTER 11](#) [DISPOSITIONAL HEARING](#)

### [CHAPTER 12](#) [POSTDISPOSITIONAL PROCEEDINGS](#)

### [CHAPTER 13](#) [APPEALS](#)

### [CHAPTER 14](#) [WAIVER INTO ADULT COURT](#)

### [CHAPTER 15](#) [CONFIDENTIALITY](#)

### [CHAPTER 16](#) [CONTEMPT AND JUVENILE SANCTIONS](#)

### [CHAPTER 17](#) [TERMINATION OF PARENTAL RIGHTS](#)

### [CHAPTER 18](#) [PARENTAL CONSENT FOR MINOR'S ABORTION](#)

### [CHAPTER 19](#) [UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT](#)

## [APPENDICES](#)

## [FORMS INDEX](#)

## [SUBJECT INDEX](#)

# Table of Contents—New and Replaced Sections

---

## [Chapter 9](#)

### [Discovery and Other Motion Practice](#)

*Replaced section*

[9.34](#) [\[Discovery\]](#).[\[Rules Applicable Specifically in Delinquency Proceedings\]](#).[\[Discovery and Inspection of Evidence\]](#) [In Camera Proceedings](#)

*Replaced sections (white pages)*

[9.65](#) [\[Practice Forms\]](#) [Motion for Severance of Juvenile Defendants \(CRM-0203\)](#).

[9.66](#) [\[Practice Forms\]](#) [Motion to Sever Charges \(CRM-0204\)](#).

## [Chapter 17](#)

### [Termination of Parental Rights](#)

*Replaced section*

[17.17](#) [\[Grounds for Termination of Parental Rights\]](#) [Relinquishment](#)

## 2024–25 Supplement

### Supplement Chapter 1

---

### Introduction

---

|   |
|---|
| Book pages supplemented: 1-1, 1-2, 1-6, and 1-7 |
|---|

*Page 1: Replaced footnote 1*

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to the Code of Federal Regulations (C.F.R.) are current through 89 Fed. Reg. 84063 (Oct. 18, 2024).

*Page 2: Read in conjunction with discussion of Jerrell C.J. in fourth full paragraph after first Note in chapter*

For a recent discussion of *Jerrell C.J.* within the context of analyzing voluntariness of a juvenile’s statement to law enforcement officers, see *State v. Kruckenberg Anderson*, [2024 WI App 45](#), [413 Wis. 2d 226](#), [11 N.W.3d 131](#) (petition for review filed). See also *State v. Hauschultz*, [No. 2022AP161-CR](#), [2024 WL 1087217](#) (Wis. Ct. App. Mar. 13, 2024) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (review denied).

*Page 6: Added second paragraph to last Note in chapter*

Further, in 2023, the Wisconsin Legislature authorized funding for project planning, development, design, site selection, and land and property acquisition for a second Type 1 juvenile correctional facility, likely in Dane County. See 2023 Wis. Act 19.

*Pages 6–7: Added sentence to end of third full paragraph after last Note in chapter*

2017 Wis. Act 253 established a pilot program that authorized the State Public Defender to appoint attorneys to represent indigent parents in CHIPS cases in five counties: Brown, Outagamie, Racine, Kenosha, and Winnebago. *See* [Wis. Stat.](#) § 48.233. Before Act 253, circuit court judges in individual cases determined whether to appoint attorneys to indigent parents at county expense. This pilot program was extended until June 30, 2023, by 2021 Wis. Act 58. The Wisconsin Legislature further extended the pilot program until June 30, 2025, by 2023 Wis. Act 19.

*Page 7: Added paragraph above “About This Book” heading*

The Wisconsin Legislature has added “like-kin” as an option for out-of-home placements for children under [Wis. Stat.](#) chs. 48 and 938. *See* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). Both [Wis. Stat.](#) §§ 48.02(12c) and 938.02(12c) define *like-kin* as “an individual who has a significant emotional relationship with a child or the child’s family that is similar to a familial relationship and who is not and has not previously been the child’s licensed foster parent. For an Indian child, ‘like-kin’ includes individuals identified by the child’s tribe according to tribal tradition, custom or resolution, code, or law.”

## Chapter 1

### Introduction

---

Wisconsin’s juvenile justice system has undergone significant changes since the mid-1990s. Most significantly, 1995 Wis. Act 77 was enacted largely in response to a perceived increase in violent juvenile crime and created the Wisconsin Juvenile Justice Code, [Wis. Stat.](#) ch. 938. Previously, [Wis. Stat.](#) ch. 48, the Wisconsin Children’s Code, had governed all cases involving delinquency, children in need of protection or services (CHIPS), and termination of parental rights (TPR). Effective July 1, 1996, 1995 Wis. Act 77 moved all delinquency-related provisions, as well as provisions related to status offenses such as school truancy and running away from home, to [Wis. Stat.](#) ch. 938. This left revised [Wis. Stat.](#) ch. 48 to govern CHIPS and TPR cases and proceedings related to the waiver of parental consent for an abortion.<sup>1</sup>

The former Children’s Code grew out of a movement to treat, rather than punish, children with problems, and the evolution of the Children’s Code reflected that movement’s philosophy in both its provisions and its terminology. For example, the term *detention* was substituted for *jail*, *adjudication* for *conviction*, and *disposition* for *sentence*. The goal was to keep families together by providing needed services, to remove children from the home only when absolutely necessary, and to incarcerate children only as a last resort. The Children’s Code granted the courts broad discretion to fashion individualized and effective dispositions.

The enactment of the Juvenile Justice Code ([Wis. Stat.](#) ch. 938) marked a clear change in the way Wisconsin views children. By situating it immediately before the Criminal Code ([Wis. Stat.](#) chs. 939–951), the legislature signaled its intent to treat young offenders—referred to as *juveniles* rather than *children*—more like adult criminals under the Criminal Code.

**Note.** In this chapter, and throughout this book, “juvenile” will be used when the discussion relates only to children under [Wis. Stat.](#) ch. 938; when the discussion relates to children generally, to children under [Wis. Stat.](#) ch. 48, or to children under either [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938, “children” will be used.

[Wis. Stat.](#) ch. 938 makes additional punitive dispositions available in delinquency cases, even as it curtails certain rights. For example, [Wis. Stat.](#) ch. 938 eliminates the right to a jury trial, although CHIPS parents retain the right to a jury trial under [Wis. Stat.](#) ch. 48.

Procedures, as well as rights, differ between [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938. For example, if a party fails to act within a time period under [Wis. Stat.](#) ch. 938, the court may dismiss the proceeding *with* prejudice; this remedy is not available, however, for a similar violation under [Wis. Stat.](#) ch. 48. *See, e.g., infra* [ch. 8](#) (time period violations). Also, whereas detention hearings under [Wis. Stat.](#) ch. 48 must be held within 48 hours, detention hearings under [Wis. Stat.](#) ch. 938 must be held within 24 hours. *See infra* [ch. 5](#) (detention hearing procedure).

In the 1997–98 legislative session, the Wisconsin Legislature enacted 1997 Wis. Act 292, which granted the court jurisdiction over unborn children in need of protection or services (UCHIPS). Under [Wis. Stat.](#) § 48.02(19), an *unborn child* is defined as “a human being

from the time of fertilization to the time of birth.” Recognizing that unborn children have certain basic needs and that their neglect or abuse has financial, societal, and emotional effects, the legislature has sought to protect the rights of unborn children whose physical development may be endangered by an expectant mother’s severe, habitual use of controlled substances, controlled substance analogs, or alcohol. When the best interests of the unborn child require action to be taken, an expectant mother can be ordered to undergo treatment, including inpatient treatment, and may be taken into custody if certain criteria are met.

In 2002, the Wisconsin Legislature made many changes to the Children’s Code and the Juvenile Justice Code, *see* 2001 Wis. Act 109, so that the Wisconsin Statutes would conform with the requirements of the federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (ASFA). Congress enacted ASFA to remedy chronic problems with the child welfare system. *See also* Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000) (eff. Mar. 27, 2000) (finalizing regulations to implement ASFA) (codified at 45 [C.F.R.](#) pt. 1355; 45 [C.F.R.](#) pt.1356; 45 [C.F.R.](#) pt. 1357).) These changes included, for example, the requirement that the juvenile court make certain findings related to efforts to prevent removal of a child from the home or to return a child safely to the home. The legislation also included requirements that the court (or an appointed panel) review a child’s permanency plan every 6 months and that the court hold a permanency review hearing every 12 months.

In the 2005–06 legislative session, further juvenile law changes included the following: “Amie’s Law,” which provides that a police chief or a sheriff may provide information to the public or others about juveniles who are registered sex offenders, if necessary to protect the public, *see* 2005 Wis. Act 5; the codification of *State v. Jerrell C.J. (In the Interest of Jerrell C.J.)*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110, which requires the recording of custodial juvenile interrogations, *see* 2005 Wis. Act 60; and the enactment of the Uniform Child Custody Jurisdiction and Enforcement Act, *see* 2005 Wis. Act 130.

In the biennial budget act of the 2007–08 legislative session, the Wisconsin Legislature created the Department of Children and Families (DCF), which is responsible for various child- and family-related programs that had been administered by the Department of Workforce Development and the former Department of Health and Family Services (DHFS), and provided for the Department of Health Services to take over certain health-related services that had been handled by the former DHFS. *See generally* 2007 Wis. Act 20.

Also during the 2007–08 legislative session, the Wisconsin Legislature created a new CHIPS ground, giving the juvenile court CHIPS jurisdiction over a child whose guardian is unable or needs assistance to care for or provide necessary special treatment or care for the child but is unwilling or unable to sign the CHIPS petition. [Wis. Stat.](#) § 48.13(4m).

2007 Wis. Act 199 made several changes to the provisions related to time limits under [Wis. Stat.](#) ch. 48 and 938. First, 2007 Wis. Act 199 replaced statutory references to “time limits” with “time periods.” Second, while failure to comply with the time limits of [Wis. Stat.](#) ch. 48 previously affected the court’s competency to proceed, failure to act within the time periods of [Wis. Stat.](#) ch. 48 does not have that effect; after passage of 2007 Wis. Act 199, both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 provide that failure to act within any time period does not deprive the court of personal or subject-matter jurisdiction or of competency to exercise that jurisdiction. Third, in both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 cases, failure to object to a period of delay or continuance waives any challenge to the court’s competency to act during the period of delay or continuance. Fourth, 2007 Wis. Act 199 specifically eliminated the court’s authority to dismiss [Wis. Stat.](#) ch. 48 proceedings with prejudice in cases in which the court or a party failed to act within an applicable time period under the Children’s Code.

During the 2009–10 legislative session, the Wisconsin Legislature incorporated the federal Indian Child Welfare Act (ICWA) into the Wisconsin Children’s Code and the Juvenile Justice Code. *See* 2009 Wis. Act 94. ICWA was enacted in 1978 and applies to certain child custody proceedings involving an Indian child. *See generally* 25 [U.S.C.](#) §§ 1901–1963. Under certain circumstances in those proceedings, ICWA requires certain notices, findings, and placement preferences, provides for tribal court jurisdiction, and provides a process for a tribe to reassume exclusive jurisdiction. In addition, ICWA provides that, under certain circumstances, a foster care placement or TPR case may be transferred from state court to tribal court, and a tribe may intervene in certain child custody proceedings in state court.

**Note.** In 2016, the federal Bureau of Indian Affairs issued rules that clarified the federal ICWA regulations. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (eff. Dec. 12, 2016).

Also during the 2009–10 legislative session, the legislature enacted 2009 Wis. Act 79, bringing [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 into compliance with the following federal acts: the Safe and Timely Interstate Placement Act of Foster Children of 2006, Pub. L. No. 109-239, 120 Stat. 508; the Child and Family Services Improvement Act of 2006, Pub. L. No. 109-288, 120 Stat. 1233; and the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949. 2009 Wis. Act 79 also authorizes a circuit court commissioner to review a child’s permanency plan, clarifies what an out-of-home placement is for the purpose of filing a TPR petition when a child has been in an out-of-home placement for 15 of the preceding 22 months, and permits disclosure of confidential child welfare records to a relative of a child and to a public or private agency in Wisconsin or any other state for certain specified purposes.



During the 2011–12 legislative session, 2011 Wis. Act 270 created additional exceptions to the rules governing the confidentiality of juvenile court records. Specifically, under 2011 Wis. Act 270, a criminal court, upon request, can review juvenile court records for the purpose of conducting or preparing for a proceeding in the criminal court. In addition, a district attorney, upon request, can review juvenile court records for the purpose of performing his or her official duties in criminal court. See [Wis. Stat.](#) § 938.396(2g)(d). Finally, a law enforcement agency, upon request, can review juvenile court records for the purpose of investigating alleged criminal or delinquent activity. See [Wis. Stat.](#) § 938.396(2g)(c).

2011 Wis. Act 270 also requires a juvenile court to make information contained in its *electronic* records available to another juvenile court, a municipal court, a criminal court, a prosecutor, a guardian ad litem (GAL) or attorney for a parent or child, a law enforcement agency, the DCF, and the Department of Corrections (DOC). See [Wis. Stat.](#) §§ 48.396(3), 938.396(2m). Such information must be made available regardless of whether the court, the person, the DCF, or the DOC is a party or otherwise involved in the proceedings in which those records were created. Disclosure of information related to a person’s physical or mental health, including court reports and permanency plans, is not permitted, however, without the person’s consent or a court order. See [Wis. Stat.](#) §§ 48.396(3)(b)2., 938.396(2m)(b)2.

2011 Wis. Act 270 specifies that when information in electronic court records is released, it must be used only as follows: a court may use the information only for the purpose of conducting or preparing for a proceeding in that court; a prosecutor, GAL, or adversary counsel may use the information only for the purpose of performing his or her official duties; a law enforcement agency may use the information only for the purpose of investigating alleged criminal or delinquent activity; and the DCF or the DOC may use the information only to provide services under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938. See [Wis. Stat.](#) §§ 48.396(3)(c), 938.396(2m)(c).

Any person who intentionally uses or discloses the information provided to him or her in the electronic records is subject to a \$5,000 forfeiture. See [Wis. Stat.](#) §§ 48.396(3)(d), 938.396(2m)(d).

In addition to the changes made by 2011 Wis. Act 270, 2011 Wis. Act 271 created a new ground for involuntary termination of parental rights. Specifically, under [Wis. Stat.](#) § 48.415(9m)(am), the court may terminate a person’s parental rights if the person committed child trafficking (prohibited under [Wis. Stat.](#) § 948.051) against *any* child.

In other legislation enacted during the 2011–12 session, 2011 Wis. Act 87 created an alternative procedure by which a parent may, without court involvement, delegate certain parental powers to an agent by a power of attorney. While the procedure permits delegation of powers regarding the care and custody of the child, there are certain exceptions to this delegation of power, including the power to consent to (1) the performance or inducement of an abortion on or for the child, and (2) the termination of parental rights to the child. [Wis. Stat.](#) § 48.979(1)(a).

Another act, 2011 Wis. Act 181, made changes related to permanency planning for children placed in out-of-home care. Specifically, 2011 Wis. Act 181 eliminated the authority of an agency to make concurrent reasonable efforts, instead permitting an agency to engage in *concurrent planning*, defined as appropriate efforts to work simultaneously toward achieving more than one permanency goal for a child placed in out-of-home care and for whom a permanency plan is required. [Wis. Stat.](#) §§ 48.355(2b)(a), 938.355(2b)(a).

2011 Wis. Act 181 also established a procedure under which the juvenile court may order a *trial reunification*, defined as a period of 7 consecutive days or longer, but not exceeding 150 days, during which a child who is placed in an out-of-home placement resides in a relative’s home from which the child was removed or in the home of either of the child’s parents for the purpose of determining the appropriateness of changing the placement of the child to that home. [Wis. Stat.](#) §§ 48.358(1)(a), 938.358(1)(a). The trial reunification procedure includes provisions for notice, a hearing, extension or revocation of the trial reunification, and removal from the trial reunification home. See generally [Wis. Stat.](#) §§ 48.358, 938.358.

In addition, 2011 Wis. Act 181 changed the term “alternative permanent placement” to “other planned permanent living arrangement”; required the living arrangement to include an appropriate, enduring relationship between the child and adult; and eliminated independent living as a planned permanent living arrangement option. See generally [Wis. Stat.](#) §§ 48.38(4), (5), 938.38(4), (5).

Finally, 2011 Wis. Act 105 and 2011 Wis. Act 165 permit a school district to use law enforcement records of children as the sole basis for taking action against a student under the school district’s athletic code. See [Wis. Stat.](#) §§ 118.125(5)(b), 118.127.

The 2013–14 legislative session brought about a variety of additional changes to the Children’s Code and the Juvenile Justice Code. For example, as part of 2013 Wis. Act 20 (the biennial budget act), the legislature increased, from 180 days to 365 days, the amount of time a juvenile can be held in specified juvenile detention facilities. See [Wis. Stat.](#) § 938.34(3)(f)1.

2013 Wis. Act 252 expanded the list of persons who can attend otherwise-confidential court hearings under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 to include a person engaged in the bona fide research, monitoring, or evaluation of activities conducted under a federal court improvement plan. *See* [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(a).

2013 Wis. Act 334 amended various provisions of [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 to allow for an out-of-home placement until age 21 if the child has an individualized education program and is a full-time student at a high school or its vocational or technical equivalent. *See* [Wis. Stat.](#) §§ 48.355(4)(b)4., 938.355(4)(am)4.

2013 Wis. Act 337 amended provisions related to the waiver of counsel in termination of parental rights proceedings. Specifically, the act states, in part, that

a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.

[Wis. Stat.](#) § 48.23(2)(b)3.

Legislative initiatives to modify the Wisconsin Children's Code and Juvenile Justice Code continued during the 2015–16 legislative session. One of the most noteworthy developments was the Wisconsin Legislature's adoption of 2015 Wis. Act 373, which modified various procedures for changing the placement of a child who is involved in certain types of court proceedings. Among other things, a juvenile court can now modify family court orders when terminating supervision in delinquency cases or in CHIPS or JIPS proceedings. *See* [Wis. Stat.](#) §§ 48.355(4g), 938.355(4g). 2015 Wis. Act 373 also created new procedures for changing the placement of a child who is under the guardianship of a child welfare agency and whose parents have had their parental rights terminated. *See* [Wis. Stat.](#) § 48.437.

The biennial budget act that passed in July 2015 also contained various provisions affecting the Children's Code and Juvenile Justice Code. *See* 2015 Wis. Act 55. For example, the budget act repealed a number of statutory references to juvenile corrective sanctions and aftercare services and replaced them with references to juvenile "community supervision." The terminology changes took effect on September 24, 2017. *See* 2017 Wis. Act 59; 2015 Wis. Act 55. In addition, 2015 Wis. Act 55 amended various statutes concerning extensions of out-of-home placements, including those under a transition-to-independent-living agreement.

In 2016, the legislature passed legislation to incorporate into the Children's Code and Juvenile Justice Code the reasonable-and-prudent-parent standard for decisions concerning a child in out-of-home care. 2015 Wis. Act 128. This legislation also modified statutory provisions relating to the contents and use of permanency planning for a child placed in out-of-home care; for example, 2015 Wis. Act 128 eliminated placement in sustaining care as a permanency goal for a child after the termination of parental rights.

Also in 2016, the legislature expanded what constitutes the crime of child sex trafficking. 2015 Wis. Act 367. As part of related amendments, the Children's Code and Juvenile Justice Code now provide that, as part of a CHIPS or JIPS dispositional order for out-of-home placement, a court need not make a finding as to whether a child welfare agency made "reasonable efforts" to prevent removal of a child from his or her home if the child's parent committed sex trafficking against that parent's child. [Wis. Stat.](#) §§ 48.355(2d)(b)3m., 938.355(2d)(b)3m.

2015 Wis. Act 368 created new statutes permitting the limited release of certain ordinarily confidential information in cases involving missing children. *See* [Wis. Stat.](#) §§ 48.78(2m), 938.78(2m).

The legislature passed several acts amending procedures and requirements in adoption and TPR proceedings in 2016. *See, e.g.,* 2015 Wis. Act 378 (relating to jurisdiction and venue in adoption proceedings and investigation of suitability of a home for adoption of a child); 2015 Wis. Act 379 (relating to preadoption preparation requirements and referrals to postadoption resource centers); 2015 Wis. Act 380 (relating to readoption of a child adopted by a resident of Wisconsin under a court order of a foreign jurisdiction); 2015 Wis. Act 381 (concerning adoption-related information required in the contents of a petition for TPR and other petitions).

During the 2017–18 legislative session, the legislature amended several sections of the Wisconsin Children's Code and the Juvenile Justice Code. 2017 Wis. Act 185 planned for closure of Wisconsin's two Type 1 juvenile correctional facilities, Lincoln Hills School and Copper Lakes School, by January 1, 2021. Act 185 also planned for the Department of Corrections (DOC) to establish one or more Type 1

juvenile correctional facilities no later than January 1, 2021. It allowed a county or Indian tribe to establish new secured residential care centers for children and youth (SRCCCYs). Act 185 also modified who supervises and cares for juveniles in correctional placements, providing that the DOC will maintain supervision over juveniles with adult court sentences and over juveniles in the Serious Juvenile Offender Program (SJOP), and counties will supervise juveniles under other correctional placements. Additionally, a court may make a correctional placement of a juvenile only to an SRCCCY under the supervision of the county, which means that juveniles who are not serving adult sentences and who are not in the SJOP will be placed in SRCCCYs rather than in Type 1 juvenile correctional facilities. 2019 Wis. Act 8 amended some language from 2017 Wis. Act 185 and extended the previously set deadlines for closing the current Type 1 juvenile correctional facilities and establishing or constructing new facilities consistent with 2017 Wis. Act 185. The deadline specified in 2019 Wis. Act 8 was July 1, 2021.

**Note.** As of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, Lincoln Hills and Copper Lake Schools have not yet closed because the contemplated county-supervised SRCCCYs are still in the development-and-approval stage. In 2022, the Wisconsin Legislature authorized funding for a new secure youth facility in Milwaukee County. *See* 2021 Wis. Act 252. After the eventual closure of the Lincoln Hills and Copper Lake Schools, those facilities will transition into an adult correctional institution. *Id.*

Other legislation enacted during the 2017–18 session eliminated the requirement in TPR cases that the party seeking to terminate someone’s parental rights prove there was a substantial likelihood that the parent would not meet the CHIPS conditions within the nine-month period after the fact-finding hearing. Under 2017 Wis. Act 256, if the child has been placed outside the home for less than 15 of the most recent 22 months, there must be a substantial likelihood that the parent will not meet the CHIPS conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

Also for TPR cases, 2017 Wis. Act 258 requires that the parent wishing to appeal a TPR order or judgment must sign the notice of intent to pursue postdisposition relief and the notice of appeal, and it specifically states that although counsel must also sign (if there is counsel on the case), counsel cannot sign the notice of intent or the notice of appeal in lieu of the appellant. The same is required for petitions for review in the Wisconsin Supreme Court. *See* [Wis. Stat.](#) § 809.107(2)(bm)6., (5)(a), (6)(f). When postjudgment fact-finding is required, and therefore the appellant must file a motion for remand in the court of appeals, the appellant must include an affidavit with that motion. [Wis. Stat.](#) § 809.107(6)(am).

2017 Wis. Act 253 established a pilot program that authorized the State Public Defender to appoint attorneys to represent indigent parents in CHIPS cases in five counties: Brown, Outagamie, Racine, Kenosha, and Winnebago. *See* [Wis. Stat.](#) § 48.233. Before Act 253, circuit court judges in individual cases determined whether to appoint attorneys to indigent parents at county expense. This pilot program was extended until June 30, 2023, by 2021 Wis. Act 58.

In 2019, the legislature created an additional ground for finding a child in need of protection or services. 2019 Wis. Act 9. The court may find that a child needs protection or services if the

child’s parent is residing in a qualifying residential family-based treatment facility or will be residing at such a facility at the time of a child’s placement with the parent in the facility, signs the petition requesting jurisdiction under [Wis. Stat. § 48.13(14)], and, with the [DCF’s] consent, requests that the child reside with him or her at the qualifying residential family-based treatment facility.

[Wis. Stat.](#) § 48.13(14). If the court makes such a finding and the child’s permanency plan recommends such a placement, the court may order placement of a child with a parent in a qualifying residential family-based treatment facility. [Wis. Stat.](#) § 48.345(3)(e).

2021 Wis. Act 42 created the concept of a “qualified residential treatment program” (QRTP) under Wisconsin state law, which is consistent with the federal Family First Prevention Services Act (FFPSA), Pub. L. No. 115-123, §§ 50701–50782, 132 Stat. 64 (2018) (codified in part at 42 [U.S.C.](#) §§ 670–679c (Title IV-E of the Social Security Act)). FFPSA includes a requirement relating to children placed in a group home or other congregate-care settings for more than two weeks. *See* 42 [U.S.C.](#) § 672(k). For a state to qualify for reimbursement via federal Title IV-E funds, a child may only be placed in certain types of group- or congregate-care settings, such as a QRTP. Consistent with this requirement, Act 42 requires both a standardized assessment by a “qualified individual” and certain findings by a court for a child to be placed in a certified QRTP at various stages of proceedings under [Wis. Stat.](#) chs. 48 and 938.

2021 Wis. Act 141 changed when appearances via telephone or live audiovisual means are permitted in proceedings under [Wis. Stat.](#) ch. 938, including providing that courts *may* permit parties to appear by telephone or audiovisually for plea hearings. However, both the juvenile and the prosecutor can object to the use of telephone or live audiovisual means “for a critical stage of the proceedings,” and the court must sustain such an objection. For all other objections, the court should consider factors outlined in [Wis. Stat.](#) § 885.56. [Wis. Stat.](#) § 938.299(5).

## About This Book

The book begins with a discussion of the rights and roles of various parties in juvenile court, followed by a discussion of jurisdiction and venue. Subsequent chapters discuss each stage of juvenile court proceedings in chronological order. Several topics, including TPR and confidentiality, warrant treatment in separate chapters. Forms and charts are included to provide additional guidance for real-world juvenile court practice.

A number of topics are beyond the scope of this book, including adoption, guardianships (including private guardianships under Wis. Stat. § 48.9795), paternity actions, and the Interstate Compact on the Placement of Children. For discussions of some of these topics, see Matthew W. Giesfeldt, [Termination of Parental Rights and Adoption: A Practical Handbook for Judges, Lawyers, and Human Services Providers](#) (State Bar of Wis. 3d ed. 2017 & Supp.); Henry J. Plum, [Minor Guardianships of the Person: Children's Court Practice and Procedure](#) (State Bar of Wis. 2020); [Wisconsin Attorney's Desk Reference](#) (State Bar of Wis. 11th ed. 2022) (chapters on independent adoption, TPR, and guardianship); 4 [Wisconsin Judicial Benchbook: Juvenile](#) (State Bar of Wis. 7th ed. 2022) (chapter on adoption, discussing adoption generally as well as guardianship for children without a living parent; chapter on venue and jurisdiction, discussing Interstate Compact on the Placement of Children). In general, the *Wisconsin Juvenile Law Handbook* focuses on procedures and substantive issues unique to juvenile cases. For example, although the rules of evidence apply to certain juvenile court proceedings, this book does not attempt an exhaustive discussion of the rules; instead, the rules of evidence are discussed only insofar as courts have specifically interpreted them in juvenile cases.

There is one caveat. Because of the dearth of case law interpreting Children's Code and Juvenile Justice Code provisions, analogous case law from other substantive areas is discussed as appropriate. Unpublished decisions are also discussed to provide the reader with interesting analysis and viable arguments. It should be remembered, however, that unpublished decisions may not be cited as authority, except as permitted by [Wis. Stat. § 809.23\(3\)](#) (providing that unpublished opinions issued on or after July 1, 2009, if authored by member of three-judge panel or by single judge under [Wis. Stat. § 752.31\(2\)](#), may be cited for their persuasive value).

## Supplement Chapter 2

### Rights of Children, Parents, and Expectant Mothers

Book sections supplemented: [2.1](#), [2.5](#), [2.13](#), [2.14](#), [2.29](#), and [2.31](#)

#### 2.1 Scope of Chapter

[Page 2: Updated currency information in footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to the Wisconsin Jury Instructions—Criminal are current through the July 2024 release.

#### 2.5 [Right to Counsel] [The Child] Delinquency

[Page 4: Added textual sentence before last sentence in third-to-last paragraph in section](#)

Representation continues throughout “all stages of the proceedings,” [Wis. Stat. § 938.23\(1m\)\(a\)](#), including waiver proceedings under [Wis. Stat. § 938.18](#), adjudication, disposition, and postdispositional proceedings. Postdispositional proceedings include extensions under [Wis. Stat. § 938.365](#), revisions under [Wis. Stat. § 938.363](#), changes in placement under [Wis. Stat. § 938.357](#), appeals, sanction proceedings under [Wis. Stat. § 938.355](#), and revocation of community supervision or aftercare supervision proceedings under [Wis. Stat. § 938.357\(5\)](#). See [Wis. Stat. §§ 938.23\(1m\)\(am\), \(ar\), 938.357\(3\), \(5\)](#). Counsel should also be involved during permanency plan reviews under [Wis. Stat. § 938.38\(5\)](#). See [chapter 10, infra](#), for a discussion of fact-finding hearings; [chapter 11, infra](#), for a discussion of dispositional hearings;



[chapter 12](#), *infra*, for a discussion of postdispositional hearings; [chapter 13](#), *infra*, for a discussion of appeals; [chapter 14](#), *infra*, for a discussion of waiver proceedings; and [chapter 16](#), *infra*, for a discussion of contempt and juvenile sanctions.

## 2.13 [Right to Counsel] [Parents] Termination of Parental Rights

[Page 6: Read in conjunction with third-to-last paragraph in section](#)

The Wisconsin Court of Appeals has distinguished the fact situations in recent cases from the circumstances in *Shirley E. See, e.g., Kenosha Cnty. Div. of Child. & Fam. Servs. v. M.A.C. (In re Termination of Parental Rts. to R.A.C.)*, [Nos. 2023AP2068, 2023AP2069, 2024 WL 2153586](#), ¶¶ 19–21 (Wis. Ct. App. May 14, 2024) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review denied); *State v. O.F. (In re Termination of Parental Rts. to J.G.R.)*, [No. 2022AP1703, 2023 WL 220118](#), ¶¶ 28–30 (Wis. Ct. App. Jan. 18, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review denied); *State v. D.L. (In re Termination of Parental Rts. to A.M.)*, [No. 2021AP2137, 2022 WL 2211605](#) (Wis. Ct. App. June 21, 2022) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review denied).

## 2.14 [Right to Counsel] [Parents] CHIPS and JIPS

[Page 7: Amended last textual sentence and accompanying citation in Note in section](#)

**Note.** 2017 Wis. Act 253 also created a pilot program in five Wisconsin counties for the state public defender’s office to provide counsel to any nonpetitioning parent after a petition has been filed in a proceeding under [Wis. Stat.](#) § 48.13. The program created under this legislation remains in effect until June 30, 2025. [Wis. Stat.](#) § 48.233, *as amended by* 2023 Wis. Act 19.

## 2.29 [Burden of Proof] CHIPS, UCHIPS, and TPR Adjudications

[Page 13: Added paragraph to end of section](#)

The Wisconsin Supreme Court recently declined to rule whether a specific burden of proof applies at the disposition phase of a TPR case. *State v. B.W. (In re Termination of Parental Rts. to B.W.)*, [2024 WI 28](#), ¶ 6 n.4, [412 Wis. 2d 364, 8 N.W.3d 22](#). But the court has since granted a petition for review in another case in which the court might resolve that issue. *State v. H.C.*, [No. 2023AP1950, 2024 WL 934221](#) (Wis. Ct. App. Mar. 5, 2024) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review granted).

## 2.31 [Burden of Proof] Postadjudicatory Stage

[Page 13: Read in conjunction with first paragraph in section](#)

The Wisconsin Supreme Court recently declined to rule whether a specific burden of proof applies at the disposition phase of a TPR case. *State v. B.W. (In re Termination of Parental Rts. to B.W.)*, [2024 WI 28](#), ¶ 6 n.4, [412 Wis. 2d 364, 8 N.W.3d 22](#). But the court has since granted a petition for review in another case in which the court might resolve that issue. *State v. H.C.*, [No. 2023AP1950, 2024 WL 934221](#) (Wis. Ct. App. Mar. 5, 2024) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review granted).

# Chapter 2

## Rights of Children, Parents, and Expectant Mothers

### I. [Scope of Chapter](#)

#### [§ 2.1]

This chapter summarizes the rights of parties in juvenile court proceedings under [Wis. Stat.](#) ch. 48 (the Wisconsin Children’s Code) and [Wis. Stat.](#) ch. 938 (the Wisconsin Juvenile Justice Code) and discusses the statutory and constitutional bases for those rights.<sup>1</sup>

### II. Right to Counsel [§ 2.2]

## A. In General [§ 2.3]

Under both the Children’s Code and the Juvenile Justice Code, any party has an absolute right to retain counsel of choice at that party’s own expense for any proceeding. [Wis. Stat.](#) §§ 48.23(5), 938.23(5). Therefore, this section focuses on situations in which a party has a statutory or constitutional right to counsel appointed by the state.

## B. The Child [§ 2.4]

### 1. [Delinquency](#) [§ 2.5]

Although juvenile delinquency proceedings are often analogized to adult criminal proceedings, a juvenile’s right to counsel in delinquency proceedings has a different basis from an adult’s in criminal proceedings. *See generally, e.g., In re Gault*, 387 U.S. 1 (1967). In adult criminal proceedings, the right to counsel derives from both the 5th and the 6th Amendments to the U.S. Constitution, applicable to the states by the 14th Amendment. U.S. Const. amends. V, VI, XIV. The 5th Amendment provides, in part as follows: “No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...” U.S. Const. amend. V; *see also* Wis. Const. art. I, § 8. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court held that, under the 5th and 14th Amendments, an accused has a right to counsel during custodial interrogation. The 6th Amendment provides, in part as follows: “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI; *see also* Wis. Const. art. I, § 7. Under *Kirby v. Illinois*, 406 U.S. 682 (1972), the 6th Amendment right to counsel attaches whenever the state initiates adversary criminal proceedings against an accused.

In actions under the Juvenile Justice Code, a juvenile’s right to counsel has both statutory and constitutional bases. For a juvenile taken into custody, [Wis. Stat.](#) § 938.297(4) provides:

Although the taking of a juvenile into custody is not an arrest, it shall be considered an arrest for the purpose of deciding motions which require a decision about the propriety of the taking into custody, including motions to suppress evidence as illegally seized, motions to suppress statements as illegally obtained and motions challenging the lawfulness of the taking into custody.

*See also* [Wis. Stat.](#) § 938.19(3) (“Taking into custody is not an arrest except for the purpose of determining whether the taking into custody or the obtaining of any evidence is lawful.”). In addition to this statutory right to counsel, a juvenile taken into custody has a right to counsel under the Due Process Clause of the 14th Amendment. U.S. Const. amend. XIV; *State v. Woods*, 117 Wis. 2d 701, 713–14, 345 N.W.2d 457 (1984), *rev’d on other grounds sub nom. Woods v. Clusen*, 605 F. Supp. 890 (E.D. Wis. 1985), *aff’d*, 794 F.2d 293 (7th Cir. 1986).

For a juvenile not taken into custody, the right to counsel has a constitutional basis. The due-process right to counsel attaches when adversarial judicial proceedings begin, a point marked by the filing of the delinquency petition. *Woods*, 117 Wis. 2d at 738–39.

**Comment.** The court in *Woods* correctly noted that the 6th Amendment right to counsel applies only to criminal prosecutions. *Id.* at 738. Under *In re Gault*, 387 U.S. 1 (1967), the right to counsel in juvenile delinquency proceedings rests on the Due Process Clause of the 14th Amendment. *Id.* at 30–31. The Due Process Clause of the 14th Amendment, U.S. Const. amend. XIV, affords juveniles the right to counsel in delinquency proceedings because of the potential for committing a juvenile to an institution and thus curtailing his or her freedom. *Gault*, 387 U.S. at 41. The *Woods* court applied a *Kirby*-type 6th Amendment analysis to the due-process right to counsel, analogizing the filing of a delinquency petition in delinquency proceedings to *Kirby*’s “commitment to prosecute” criterion in criminal cases. *Woods*, 117 Wis. 2d at 738. *See* [chapter 9](#), *infra*, for a discussion of pretrial motions challenging violations of a juvenile’s right to counsel.

Juveniles have a constitutional due-process right to counsel in waiver proceedings as well. *Kent v. United States*, 383 U.S. 541 (1966); *Miller v. Quatsoe*, 332 F. Supp. 1269 (E.D. Wis. 1971); *see* [Wis. Stat.](#) § 938.18; *see also* *infra* [ch. 14](#) (waiver).

In addition, [Wis. Stat.](#) § 938.23 requires that any juvenile either alleged to be delinquent under [Wis. Stat.](#) § 938.12 or held in a juvenile detention facility be represented by adversary counsel “at all stages of the proceedings.” [Wis. Stat.](#) § 938.23(1m)(a) (also allowing juvenile 15 years old or older to waive counsel under certain circumstances). A delinquency action may generally be brought against any juvenile between 10 and 16 years of age who has violated any state or federal criminal law. [Wis. Stat.](#) § 938.12; *see also* [Wis. Stat.](#) § 938.02(3m) (defining “delinquent”). *But see* [Wis. Stat.](#) § 938.17 (stating jurisdictional provisions applicable in cases involving traffic, boating,

snowmobile, all-terrain vehicle, utility terrain vehicle, and limited-use off-highway motorcycle violations, as well as in cases of civil law and ordinance violations by juveniles). See generally *infra* [ch. 4](#) (further discussion of juvenile court jurisdiction). The statutory right to counsel attaches when “proceedings” commence, which occurs either upon the filing of a delinquency petition or when a court holds a hearing under [Wis. Stat. § 938.21](#) to determine whether to continue holding the juvenile in custody, whichever is first. *Woods*, 117 Wis. 2d at 736. See generally *infra* [ch. 5](#) (further discussion of procedures when juvenile is held in physical custody).

**Note.** [Wis. Stat. § 938.23\(1g\)](#) defines *counsel* as an attorney acting as adversary counsel. [Wis. Stat. § 938.23\(1j\)](#) states that counsel “shall advance and protect the legal rights of the party represented, and ... may not act as guardian ad litem for any party in the same proceeding.” See [chapter 3, infra](#), for a further discussion of the parties’ roles in juvenile court proceedings.

Representation continues throughout “all stages of the proceedings,” [Wis. Stat. § 938.23\(1m\)\(a\)](#), including waiver proceedings under [Wis. Stat. § 938.18](#), adjudication, disposition, and postdispositional proceedings. Postdispositional proceedings include extensions under [Wis. Stat. § 938.365](#), revisions under [Wis. Stat. § 938.363](#), changes in placement under [Wis. Stat. § 938.357](#), appeals, sanction proceedings under [Wis. Stat. § 938.355](#), and revocation of community supervision or aftercare supervision proceedings under [Wis. Stat. § 938.357\(5\)](#). See [Wis. Stat. §§ 938.23\(1m\)\(am\), \(ar\), 938.357\(3\), \(5\)](#). See [chapter 10, infra](#), for a discussion of fact-finding hearings; [chapter 11, infra](#), for a discussion of dispositional hearings; [chapter 12, infra](#), for a discussion of postdispositional hearings; [chapter 13, infra](#), for a discussion of appeals; [chapter 14, infra](#), for a discussion of waiver proceedings; and [chapter 16, infra](#), for a discussion of contempt and juvenile sanctions.

The right to counsel includes the right to *effective* assistance of counsel, including counsel who will act to make “skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it.” *Gault*, 387 U.S. at 36. See generally *infra* [ch. 3](#) (discussion of role of defense counsel in juvenile court proceedings).

A juvenile 15 years of age or older can waive counsel, but only after the juvenile court finds that the waiver was voluntarily and knowingly made. [Wis. Stat. § 938.23\(1m\)\(a\)](#). If a juvenile is not represented by counsel (even if the juvenile waived the right to counsel), a juvenile court cannot waive the juvenile into adult court under [Wis. Stat. § 938.18](#), place the juvenile in a juvenile correctional placement under [Wis. Stat. § 938.34\(4m\)](#), or transfer supervision of the juvenile to the Department of Corrections for participation in the serious juvenile offender program under [Wis. Stat. § 938.538](#). [Wis. Stat. § 938.23\(1m\)\(a\)](#).

## 2. CHIPS and JIPS [§ 2.6]

In proceedings alleging a juvenile to be in need of protection or services under [Wis. Stat. § 938.13](#) (JIPS) or a child to be in need of protection or services under [Wis. Stat. § 48.13](#) (CHIPS), the right to counsel has a statutory basis. In such proceedings, the child or juvenile can be represented by adversary counsel at the discretion of the court. [Wis. Stat. §§ 48.23\(1m\)\(b\)1., 938.23\(1m\)\(b\)1](#). However, the court must appoint counsel for any child alleged to be in need of protection or services based on abuse or neglect under [Wis. Stat. § 48.13\(3\), \(3m\), \(10\), \(10m\), or \(11\)](#). [Wis. Stat. § 48.23\(3m\)](#). If the child is younger than 12 years old, the court may appoint a guardian ad litem instead. *Id.*

If the CHIPS or JIPS petition is contested, the court cannot place the child outside the home unless adversary counsel represented the child at the fact-finding hearing and subsequent proceedings. [Wis. Stat. §§ 48.23\(1m\)\(b\)2., 938.23\(1m\)\(b\)2](#). With an uncontested petition, the court cannot place the child outside the home unless adversary counsel represented the child “at the hearing at which the placement is made,” [Wis. Stat. §§ 48.23\(1m\)\(b\)2., 938.23\(1m\)\(b\)2](#).—that is, at the original dispositional hearing under [Wis. Stat. § 48.335](#) or [938.335](#), at a change-in-placement hearing under [Wis. Stat. § 48.357](#) or [938.357](#), or at an extension hearing under [Wis. Stat. § 48.365](#) or [938.365](#). For children under 12 years of age, however, the juvenile court can appoint a guardian ad litem instead of adversary counsel. [Wis. Stat. §§ 48.23\(1m\)\(b\)2., 938.23\(1m\)\(b\)2](#).

In CHIPS or JIPS proceedings, a child 15 years of age or older can waive counsel if the juvenile court finds that the waiver is knowingly and voluntarily made and the court accepts the waiver. [Wis. Stat. §§ 48.23\(1m\)\(b\)1., 938.23\(1m\)\(b\)1](#). If the child waives counsel, the juvenile court cannot place the child outside the home.

## 3. UCHIPS [§ 2.7]

In proceedings alleging an unborn child to be in need of protection or services (UCHIPS) under [Wis. Stat. § 48.133](#), if the unborn child’s expectant mother is a child (referred to in [Wis. Stat. ch. 48](#) as a *child expectant mother*), the child expectant mother must be represented by counsel and cannot waive counsel. [Wis. Stat. § 48.23\(2m\)\(a\)](#); see also [Wis. Stat. § 48.02\(2\)](#) (defining *child* as “a person who is less than 18 years of age”). If the child expectant mother is younger than 12 years old, the court may appoint a guardian ad litem instead. [Wis. Stat. § 48.23\(2m\)\(c\)](#). If the UCHIPS petition is contested, the court cannot place the child expectant mother outside her home unless adversary counsel represented her at the fact-finding hearing and subsequent proceedings. [Wis. Stat. § 48.23\(2m\)\(b\)](#). If the petition is not contested,

the court cannot place the child expectant mother outside her home unless she was represented by counsel at the hearing at which the placement is made. *Id.*

#### 4. Termination of Parental Rights [§ 2.8]

**Note.** In this chapter, termination of parental rights (TPR) refers to involuntary TPR proceedings under [Wis. Stat.](#) § 48.415. See [chapter 17](#), *infra*, for a brief discussion of voluntary TPR.

A child in a TPR proceeding does not have a right to adversary counsel. Rather, the court must appoint a guardian ad litem for the child. [Wis. Stat.](#) § 48.235(1)(c). Nevertheless, the court *may* also appoint adversary counsel upon request or on its own motion if the child does not have, or does not wish to retain, counsel of the child's own choosing. [Wis. Stat.](#) § 48.23(3).

#### 5. [Wis. Stat.](#)

#### Ch. 51 and [Wis. Stat.](#) Ch. 55 Proceedings [§ 2.9]

The Children's Code requires that counsel represent a child in proceedings pertaining to that child under [Wis. Stat.](#) ch. 51 (Mental Health Act) and [Wis. Stat.](#) ch. 55 (protective placement). [Wis. Stat.](#) §§ 48.14(5), 48.23(1m)(c). A child cannot waive counsel in these proceedings. [Wis. Stat.](#) § 48.23(1m)(c).

#### 6. Criminal Contempt [§ 2.10]

Under [Wis. Stat.](#) § 938.23(1m)(am) and (4), a juvenile has the right to counsel in contempt proceedings based on alleged disobedience of a dispositional order. *B.L.P. v. Circuit Ct. for Racine Cnty. (In re Contempt Finding Against B.L.P.)*, 118 Wis. 2d 33, 44 n.5, 345 N.W.2d 510 (Ct. App. 1984). See [chapter 16](#), *infra*, for a discussion of using contempt actions to force compliance with juvenile court orders or to punish noncompliance.

### C. Parents [§ 2.11]

#### 1. Delinquency [§ 2.12]

In Wisconsin, juveniles alleged to be delinquent have a right to counsel, as discussed in section [2.5](#), *supra*. Parents of juveniles alleged to be delinquent, however, do not have a right to counsel.

#### 2. [Termination of Parental Rights](#) [§ 2.13]

In some cases, the Due Process Clause of the 14th Amendment requires the appointment of counsel for indigent parents against whom a petition to terminate parental rights has been filed. U.S. Const. amend. XIV; *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981). The circuit court decides on a case-by-case basis, subject to appellate review, whether due process requires appointment of counsel for indigent parents. *Lassiter*, 452 U.S. at 31–32. In *Lassiter*, the U.S. Supreme Court also acknowledged that “[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well,” further characterizing the availability of a statutory right to counsel as probably “enlightened and wise.” *Id.* at 33–34.

The Children's Code provides a statutory right to counsel for parents in TPR proceedings. [Wis. Stat.](#) § 48.23(2). The right to counsel implies the right to effective assistance of counsel, *A.S. v. State (In the Int. of M.D.(S.))*, 168 Wis. 2d 995, 485 N.W.2d 52 (1992) (overruling *C.N. v. Waukesha Cnty. Cmty. Hum. Servs. Dep't (In the Int. of S.S.K.)*, 143 Wis. 2d 603, 422 N.W.2d 450 (Ct. App. 1988))—that is, “zealous, competent and independent” representation. *E.H. v. Milwaukee Cnty. (In the Int. of T.L.)*, 151 Wis. 2d 725, 737, 445 N.W.2d 729 (Ct. App. 1989). For a discussion of what constitutes effective assistance of counsel in adult criminal cases, see *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Harvey*, 139 Wis. 2d 353, 407 N.W.2d 235 (1987).

A parent 18 years old or older can waive counsel, but a parent under 18 years of age cannot. [Wis. Stat.](#) § 48.23(2). A valid waiver must be knowing and voluntary. The attorney must attend the hearing. If a parent lacks representation at the hearing, the court must “determine by careful questioning” that the parent has knowingly and voluntarily waived counsel's presence. *M.W. v. Monroe Cnty. Dep't of Hum. Servs. (In re Termination of Parental Rts. to M.A.M.)*, 116 Wis. 2d 432, 439, 342 N.W.2d 410 (1984), *withdrawn in part on other grounds by*



*Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, [2004 WI 47](#), ¶ 7, 271 Wis. 2d 1, 678 N.W.2d 856. The circuit court cannot dismiss counsel for the parent at the dispositional phase of the TPR proceeding, even when the court has found the parent in default as a sanction for the parent's failure to obey the court's order to appear personally at the fact-finding stage. *State v. Shirley E. (In re Termination of Parental Rts. to Torrance P.)*, [2006 WI 129](#), ¶¶ 3, 65, 298 Wis. 2d 1, 724 N.W.2d 623.

Notwithstanding *Shirley E.*,

a parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. If the court finds that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.

[Wis. Stat.](#) § 48.23(2)(b)3.

In a proceeding to vacate or reconsider a default judgment granted in an involuntary TPR proceeding, a parent who has waived counsel or who is presumed to have waived counsel in the involuntary TPR proceeding must be represented by counsel, unless in the proceeding to vacate or reconsider the default judgment the parent waives counsel or is presumed to have waived counsel. [Wis. Stat.](#) § 48.23(2)(c).

### 3. [CHIPS and JIPS](#) [§ 2.14]

The statutory right to counsel for parents of children alleged to be in need of protection or services has changed over the past few decades. Before 1995, parents in CHIPS cases had a statutory right to counsel. In 1995, however, 1995 Wis. Act 27 eliminated the statutory right to counsel for parents in CHIPS cases *and* prohibited the courts from exercising their authority to appoint counsel for those parents. Shortly thereafter, the Wisconsin Supreme Court concluded the Wisconsin Legislature could not prohibit courts from appointing counsel because such a prohibition was unconstitutional. *See Joni B. v. State*, [202 Wis. 2d 1](#), 549 N.W.2d 411 (1996). In 2018, the legislature removed the unconstitutional language in [Wis. Stat.](#) § 48.23(3), when it enacted 2017 Wis. Act 253. Although there is no right to appointed counsel, a court can exercise its discretion and appoint counsel for parents in CHIPS cases.

Even before 2017 Wis. Act 253 amended [Wis. Stat.](#) § 48.23(3), many courts invoked their inherent authority to appoint counsel if there was a reasonable concern that a parent would not be able to provide meaningful self-representation. *See State v. Tammy L.D. (In the Int. of Xena X. D.-C.)*, [2000 WI App 200](#), 238 Wis. 2d 516, 617 N.W.2d 894 (holding that when parent asks for counsel or when there is reasonable concern that parent will not be able to provide meaningful self-representation, court must evaluate facts and applicable law to reach reasonable decision on whether to appoint counsel); *see also Juneau Cnty. Dep't of Hum. Servs. v. James B. (In the Int. of Adra B.)*, [2000 WI App 86](#), 234 Wis. 2d 406, 610 N.W.2d 144 (holding that [Wis. Stat.](#) § 48.23 (1997–98) did not preclude appointment of counsel in CHIPS case after appeal had been filed).

**Note.** 2017 Wis. Act 253 also created a pilot program in five Wisconsin counties for the state public defender's office to provide counsel to any nonpetitioning parent after a petition has been filed in a proceeding under [Wis. Stat.](#) § 48.13. The program created under this legislation remains in effect until June 30, 2023. [Wis. Stat.](#) § 48.233, *as amended by* 2021 Wis. Act 58.

In CHIPS cases in which a parent is entitled to counsel, the court must refer the parent to the state public defender for an eligibility determination if that parent is 18 years of age or older, does not knowingly and voluntarily waive counsel, and is unable to afford counsel in full. *See* [Wis. Stat.](#) § 48.23(4)(b).

In JIPS cases, [Wis. Stat.](#) § 938.23(2g) creates a statutory right to counsel specifically for parents or Indian custodians of Indian juveniles. Whenever an Indian juvenile is the subject of a proceeding under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) involving the removal of the Indian juvenile from the home of his or her parent or Indian custodian or the placement of the Indian juvenile in an out-of-home care placement, the Indian juvenile's parent or Indian custodian has the right to be represented by counsel. If an Indian parent is entitled to counsel in such a case, the court must refer the parent to the state public defender for an eligibility determination if that parent is 18 years of age or older, does not knowingly and voluntarily waive counsel, and is unable to afford counsel in full. [Wis. Stat.](#) § 938.23(4).

## D. Adult Expectant Mothers: UCHIPS [§ 2.15]

In UCHIPS proceedings, see [Wis. Stat.](#) § 48.133, the court may, in its discretion, appoint counsel for an adult expectant mother. [Wis. Stat.](#) § 48.23(3). If the UCHIPS petition is contested, the adult expectant mother cannot be placed outside her home unless she is represented by counsel at the fact-finding hearing and subsequent proceedings. [Wis. Stat.](#) § 48.23(2m)(b). If the petition is not contested, the adult expectant mother cannot be placed outside her home unless she is represented by counsel at the hearing at which the placement is made. *Id.* An adult expectant mother may waive counsel if the court finds that her waiver is knowingly and voluntarily made. *Id.*

**Note.** The court may place the adult expectant mother outside her home if she has waived counsel. *Id.*

### E. Valid Waiver of Right to Counsel [§ 2.16]

For a waiver of counsel to be valid, the record must demonstrate the “intentional relinquishment or abandonment” of the right to counsel. *In re Gault*, 387 U.S. 1, 42 (1967) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Under both the Children’s Code and the Juvenile Justice Code, a waiver of right to counsel must be knowingly and voluntarily made, [Wis. Stat.](#) §§ 48.23(1m)(a), (1m)(b), (2), (2m)(b), (4), 938.23(1m)(a), (1m)(b), (4); this is the same standard applied in adult criminal cases. The Wisconsin Supreme Court has stated: “So important is the right to attorney representation in a criminal proceeding that nonwaiver is presumed and waiver must be affirmatively shown to be knowing and voluntary in order for it to be valid.” *Pickens v. State*, 96 Wis. 2d 549, 555, 292 N.W.2d 601 (1980), *overruled in part by State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997); see also *State v. Jones*, 192 Wis. 2d 78, 101–02, 532 N.W.2d 79 (1995). The Wisconsin Supreme Court mandates that circuit courts use a colloquy “in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel.” *Klessig*, 211 Wis. 2d at 206. Under *Klessig*, the colloquy must be designed to ensure that the defendant is

1. Making a deliberate choice to proceed without counsel,
2. Aware of the difficulties and disadvantages of self-representation,
3. Aware of the seriousness of the charges, and
4. Aware of the general range of penalties that could be imposed.

*Id.*

If any one of the four conditions prescribed in *Klessig* is not met, the circuit court must conclude that the defendant has not validly waived the right to counsel. *State v. Imani*, 2010 WI 66, ¶ 3, 326 Wis. 2d 179, 786 N.W.2d 40.

The court must also determine whether the defendant “possesses the minimal competence necessary to conduct [the defendant’s] own defense.” *Pickens*, 96 Wis. 2d at 569. Even after the court has granted waiver of counsel, the “court has a continuing responsibility to watch over the defendant and insure that his incompetence is not allowed to substitute for the obligation of the state to prove its case.” *Id.* The court must also advise the criminal defendant that the judge will not represent the defendant or protect the defendant’s interests in the same way a lawyer would. [Wis. JI](#)—Criminal SM-30. Finally, the court should warn the defendant of the dangers of self-representation and advise the defendant of the possibility that counsel might be able to discover defenses to the charges and mitigating circumstances. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948); see [Wis. JI](#)—Criminal SM-30.

Applying *Pickens* and *Klessig* to juvenile proceedings, the court should advise a party of the right to counsel, of the allegations in the petition, of potential dispositions, and of the difficulties and disadvantages of self-representation. See *S.Y. v. Eau Claire Cnty. (In re Condition of S.Y.)*, 162 Wis. 2d 320, 334–35, 469 N.W.2d 836 (1991), *aff’g* 156 Wis. 2d 317, 457 N.W.2d 326 (Ct. App. 1990) (applying *Pickens* standard to waiver of counsel in [Wis. Stat.](#) ch. 51 proceedings). The court should determine the competency of the party to conduct the party’s defense and should ensure that the decision to proceed without counsel is a deliberate choice. See [chapters 8 and 17, infra](#), for discussions about advising of rights during plea hearings in proceedings relating to delinquency, JIPS, CHIPS, UCHIPS, and TPR.

A question remains about the constitutionality of statutory provisions under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 prohibiting waiver of the right to counsel in certain situations. [Wis. Stat.](#) §§ 48.23(1m)(b)1., (1m)(c), (2), 938.23(1m)(b)1. In *S.Y.*, the Wisconsin Supreme Court held that Wis. Const. article I, section 21(2), “affords the right of any person to self-representation” and left open the question whether children (and parents) have a state constitutional right to proceed pro se in juvenile court proceedings. *S.Y.*, 162 Wis. 2d at 330, 332 n.6; see Wis. Const. art. I, § 21(2) (“In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor’s choice.”).

## III. Right to Jury Trial at Fact-Finding Stage [§ 2.17]

## A. Delinquency and JIPS [§ 2.18]

A juvenile does not have any state or federal constitutional right to a jury trial in a delinquency proceeding. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *N.E. v. Wisconsin Dep't of Health & Soc. Servs. (In the Int. of N.E.)*, 122 Wis. 2d 198, 201, 361 N.W.2d 693 (1985). Nor is there a fundamental right to one. *See N.E.*, 122 Wis. 2d at 207–08.

A juvenile does not have a statutory right to a jury trial in delinquency or JIPS proceedings, either. The Children's Code formerly extended to children the statutory right to a jury trial, even in delinquency cases. *See, e.g., Wis. Stat.* § 48.243(1)(g) (1993–94). In enacting the Juvenile Justice Code, the legislature specifically eliminated this right in delinquency and JIPS proceedings. *Compare Wis. Stat.* § 48.31(2), with *Wis. Stat.* § 938.31(2). *See also State v. Hezzie R. (In the Int. of Hezzie R.)*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998) (rejecting arguments that jury trials for juveniles were required by Due Process and Equal Protection Clauses of Wisconsin and U.S. Constitutions).

In addition, a juvenile has no statutory right to a jury trial on the issue of mental responsibility if the juvenile has raised a defense of not guilty by mental disease or defect (NGI), *R.H.L. v. State (In the Int. of R.H.L.)*, 159 Wis. 2d 653, 464 N.W.2d 848 (Ct. App. 1990); *see Wis. Stat.* § 938.30(5), nor does a juvenile have a statutory right to a jury trial in a juvenile waiver proceeding under *Wis. Stat.* § 938.18.

## B. CHIPS [§ 2.19]

There is a right to a jury trial in CHIPS cases under *Wis. Stat.* ch. 48. *Wis. Stat.* §§ 48.243(1)(g), 48.31(2). A parent or child must request a jury trial before the end of the plea hearing; failure to make a timely request waives the right to a jury trial. *Wis. Stat.* §§ 48.30(2), 48.31(2). The court, however, must grant a continuance of the plea hearing if any nonpetitioning party desires to consult an attorney about whether to request a jury trial or substitution of judge. *Wis. Stat.* § 48.30(2).

Once a party invokes the statutory right to a jury trial, withdrawal of the jury trial demand must be knowingly and voluntarily made and must satisfy several requirements. The party seeking withdrawal must make the demand personally, not by counsel on behalf of the party. The party can withdraw the jury trial demand in writing, but the party must file the writing with the court, and the writing must state that the party has made the decision “knowingly and voluntarily after receiving the advice of counsel.” *N.E. v. Wisconsin Dep't of Health & Soc. Servs. (In the Int. of N.E.)*, 122 Wis. 2d 198, 208, 361 N.W.2d 693 (1985). (Although *N.E.* concerned a juvenile's waiver of a jury trial in a delinquency proceeding, the holding rested on the language of *Wis. Stat.* § 48.31(2), which also applied to CHIPS proceedings at the time of the decision.) The party can also withdraw the demand in open court, in which case the court must personally address the party to make certain that the withdrawal of the jury trial demand is knowing and voluntary. *Id.*

## C. UCHIPS [§ 2.20]

In UCHIPS proceedings, the unborn child's guardian ad litem or the expectant mother of the unborn child may request a jury trial. The request must occur either before or during the plea hearing. *Wis. Stat.* § 48.31(2).

## D. Termination of Parental Rights [§ 2.21]

Although due process requires that parents be afforded a meaningful hearing before their parental rights can be terminated, *see Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that parents are constitutionally entitled to hearing before children removed from their custody), parents do not have a right to a jury trial under either the U.S. or the Wisconsin Constitution.

Under *Wis. Stat.* § 48.422(4), parents have a statutory right to a jury trial, but they must request a jury trial “before the end of the initial hearing on the petition.” *Wis. Stat.* § 48.422(4). For further discussion of the right to a jury trial in TPR cases, *see chapter 17, infra*.

# IV. Right to Remain Silent [§ 2.22]

## A. Right Against Self-Incrimination in Juvenile Court Proceedings [§ 2.23]

In criminal cases, the right against self-incrimination is guaranteed by both Wis. Const. article 1, section 8, and the 5th Amendment to the U.S. Constitution, which is made applicable to the states by the Due Process Clause of the 14th Amendment. *See* U.S. Const. amends. V, XIV. Under *In re Gault*, 387 U.S. 1, 36 (1967), juvenile delinquency proceedings qualify as criminal proceedings for the purpose of the

privilege against self-incrimination because commitment to a state institution—or even prosecution in adult court—might result. *But see Allen v. Illinois*, 478 U.S. 364, 372–73 (1986) (discussing scope of *Gault*).

Consequently, juveniles taken into custody have the same constitutional privilege against self-incrimination as adults and must be advised of the right to remain silent. *Gault*, 387 U.S. at 55. *But see State v. Thomas J.W. (In the Int. of Thomas J.W.)*, 213 Wis. 2d 264, 570 N.W.2d 586 (Ct. App. 1997) (holding that juvenile need not be advised of right to remain silent in CHIPS proceedings, which are significantly different from criminal proceedings). A juvenile’s Fifth Amendment right against self-incrimination continues throughout adjudication, disposition, and appeal. *State v. B.S. (In the Int. of B.S.)*, 162 Wis. 2d 378, 404, 469 N.W.2d 860 (Ct. App. 1991); *State v. Harris*, 92 Wis. 2d 836, 845, 285 N.W.2d 917 (Ct. App. 1979). Any waiver of the right must be knowing, intelligent, and voluntary. *Gault*, 387 U.S. at 55; *State v. J.H.S.*, 90 Wis. 2d 613, 618, 280 N.W.2d 356 (Ct. App. 1979).

See [chapter 9](#), *infra*, for a discussion of pretrial suppression motions based on a violation of a juvenile’s Fifth Amendment right to remain silent.

## B. Right Against Self-Incrimination When Potential Exists for Criminal or Quasi-criminal Prosecution [§ 2.24]

The right against self-incrimination under the 5th and 14th Amendments is “unequivocal and without exception”; its scope is “comprehensive.” U.S. Const. amends. V, XIV; *In re Gault*, 387 U.S. 1, 47 (1967). The availability of the privilege turns on “the nature of the statement or admission and the exposure which it invites” and not on the type of proceeding in which someone invokes the privilege. *Gault*, 387 U.S. at 49. Therefore, characterizing a proceeding as civil has no bearing on whether a witness in the proceeding has a privilege against self-incrimination: the privilege extends to both civil and criminal proceedings. *Grant v. State (In re Grant)*, 83 Wis. 2d 77, 81, 264 N.W.2d 587 (1978).

The refusal to answer is justified if the potential exists for subjecting the witness to criminal actions or to civil actions “so far criminal in their nature” as to trigger the protections of the Fifth Amendment. *United States v. Ward*, 448 U.S. 242, 253 (1980). Consequently, in nondelinquency proceedings, if a witness has a “real and appreciable apprehension that the information requested could be used against [the witness] in a criminal proceeding,” the witness can invoke the privilege. *Grant*, 83 Wis. 2d at 81. For example, in *Grant*, the Wisconsin Supreme Court reversed a contempt judgment arising from an individual’s refusal to testify in a paternity action, holding that she had properly exercised her constitutional right to remain silent. *But see Baltimore City Dep’t of Soc. Servs. v. Bouknight*, 488 U.S. 1301 (1988).

**Practice Tip.** Defense counsel should pay particular attention to any criminal charges pending against a parent or child and to the potential for criminal charges, especially in neglect and abuse cases. See [Wis. Stat.](#) ch. 948. See [chapters 10](#) and [17](#), *infra*, for a discussion of fact-finding hearings in CHIPS and TPR cases in which parallel criminal charges are pending or contemplated.

In addition to this constitutional right, parents and children have an independent, statutory right to remain silent in juvenile court proceedings under both the Children’s Code and the Juvenile Justice Code. The Children’s Code provides for advising a parent, expectant mother, or child of “[t]he right to remain silent and the fact that silence of any party may be relevant.” [Wis. Stat.](#) § 48.243(1)(c). The Juvenile Justice Code provides for advising a juvenile and, in JIPS cases, the parents, of “[t]he right to remain silent, the fact that in a delinquency proceeding the silence of the juvenile is not to be adversely considered by the court, and the fact that in a nondelinquency proceeding the silence of any party may be relevant.” [Wis. Stat.](#) § 938.243(1)(c).

Thus, under these sections, a juvenile’s silence in a delinquency proceeding cannot be commented on or argued to the judge or jury in that proceeding, see *Doyle v. Ohio*, 426 U.S. 610 (1976); *State v. Fencil*, 109 Wis. 2d 224, 233–34, 325 N.W.2d 703 (1982), but silence by a parent, expectant mother, or child, any of whom is the focus of a CHIPS or UCHIPS inquiry under [Wis. Stat.](#) ch. 48 or a JIPS inquiry under [Wis. Stat.](#) ch. 938, can be brought to the attention of, and considered by, the court or jury if relevant.

## V. Right of Confrontation and Cross-examination; Right to Present and Subpoena Witnesses [§ 2.25]

Although the 6th Amendment Confrontation Clause applies only to criminal prosecutions, see U.S. Const. amend. VI; see also Wis. Const. art. I, § 7 (providing accused in criminal prosecution right to “meet the witnesses face to face”), the Due Process Clause of the 14th Amendment guarantees a juvenile the right to confront and cross-examine adverse witnesses in both delinquency and waiver proceedings, including the postadjudicative stage. U.S. Const. amend. XIV; *Schall v. Martin*, 467 U.S. 253, 263 (1984); *In re Gault*, 387 U.S. 1, 56 (1967); *Kent v. United States*, 383 U.S. 541, 563 (1966); *State v. B.S. (In the Int. of B.S.)*, 162 Wis. 2d 378, 402, 469 N.W.2d 860 (Ct. App. 1991). Parents in these proceedings also have the right under the Due Process Clause of the 14th Amendment to confront and cross-examine witnesses. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (TPR proceedings); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (dependency proceedings). Because “‘face-to face confrontation enhances the accuracy of factfinding ...’ counsel can argue that the right to have witnesses testify in open court is one of the ‘necessary component[s] of accurate factfinding’ ... that commands the protection of the Due



Process Clause.” 2 Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Court* § 46.01, at 1019 (1991) (citations omitted). Fundamental to due process is “an effective opportunity to defend by confronting any adverse witnesses,” even if the interest at stake is the loss of welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970).

In addition, [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 provide a statutory right to confront and cross-examine witnesses at various stages of the proceedings, including

1. Waiver proceedings under [Wis. Stat.](#) § 938.18(3)(b);
2. Delinquency and JIPS proceedings, [Wis. Stat.](#) § 938.243(1)(d);
3. Change-in-placement hearings under [Wis. Stat.](#) § 938.357(3) if the proposed change would involve placing the juvenile (other than a juvenile on community supervision or in aftercare) in a juvenile correctional facility or a secured residential care center for children and youth;
4. CHIPS proceedings, [Wis. Stat.](#) § 48.243(1)(d) (extending right to confront and cross-examine witnesses to both parents and children); and
5. UCHIPS proceedings, *id.*

In criminal cases, the right to present evidence on one’s behalf is guaranteed under the Due Process Clauses of the 5th and 14th Amendments, U.S. Const. amends. V, XIV, and under Wis. Const. art. I, § 8. To give effect to the right to present a defense, the 6th Amendment guarantees a criminal defendant the right of compulsory process to obtain the presence of witnesses on the defendant’s behalf. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI; *see also* Wis. Const. art. I, § 7 (defendant guaranteed right of “compulsory process to compel the attendance of witnesses in his behalf”).

Both the Children’s Code and the Juvenile Justice Code reflect the view that the right to present a defense is a fundamental characteristic of due process. *Gault*, 387 U.S. at 36; *Kent*, 383 U.S. at 563. [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 provide rights to present and subpoena witnesses in CHIPS, UCHIPS, JIPS, and delinquency proceedings, [Wis. Stat.](#) §§ 48.243(1)(f), 938.243(1)(f); to compulsory process for any person whose presence is necessary, [Wis. Stat.](#) §§ 48.27(2), 938.27(2); and to present evidence at various stages of the proceedings, *see, e.g.*, [Wis. Stat.](#) §§ 48.335(3) (dispositional hearing), 48.365(2m)(a)1. (extension), 938.18(3)(b) (adult court waiver hearing), 938.335(3), 938.357(3) (change-in-placement hearing), 938.365(2m)(a)1.

## VI. Right Against Unreasonable Search and Seizure [§ 2.26]

The Fourth Amendment right against unreasonable searches and seizures is not limited to adult citizens of the United States. U.S. Const. amend. IV; *L.L. v. Circuit Ct. (In the Int. of L.L.)*, 90 Wis. 2d 585, 592, 280 N.W.2d 343 (Ct. App. 1979). Thus, the rule excluding the use of illegally obtained evidence applies in juvenile delinquency proceedings. *Id.*; *see also New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *See chapter 9, infra*, for a discussion of pretrial suppression motions, and *chapter 14, infra*, for a discussion of the use of reliable evidence in the prosecutive-merit stage of a waiver proceeding.

## VII. Burden of Proof [§ 2.27]

### A. Delinquency Adjudications [§ 2.28]

The burden of proof at the fact-finding stage of a delinquency proceeding is beyond a reasonable doubt. The Juvenile Justice Code and the Due Process Clause of the 14th Amendment mandate this standard. U.S. Const. amend. XIV; [Wis. Stat.](#) §§ 938.243(1)(h), 938.31(1); *In re Winship*, 397 U.S. 358 (1970); *see also State v. Corey J.G. (In the Int. of Corey J.G.)*, 215 Wis. 2d 395, 409, 572 N.W.2d 845 (1998).

### B. CHIPS, UCHIPS, and TPR Adjudications

#### [§ 2.29]

The burden of proof at the fact-finding stage of CHIPS, UCHIPS, and TPR proceedings is clear and convincing evidence, which courts have upheld as constitutionally permissible, even though it is a lesser standard than “beyond a reasonable doubt.” [Wis. Stat.](#) § 48.243(1)(h);

*Santosky v. Kramer*, 455 U.S. 745 (1982); *R.D.K. v. Sheboygan Cnty. Soc. Servs. Dep't (In re Termination of Parental Rts. to A.M.K.)*, 105 Wis. 2d 91, 110, 312 N.W.2d 840 (Ct. App. 1981).

**Caveat.** An exception to this lesser standard occurs in proceedings to terminate parental rights under the federal Indian Child Welfare Act (ICWA), which additionally requires proof beyond a reasonable doubt that the continued custody of an Indian child by the child's parent or Indian custodian is "likely to result in serious emotional or physical damage." [Wis. Stat. § 48.028\(4\)\(e\)](#); see also 25 [U.S.C. § 1912\(f\)](#). See [chapter 17](#), *infra*, for further discussion of burden-of-proof issues in proceedings to terminate parental rights to an Indian child.

### C. JIPS Adjudications Under [Wis. Stat. Ch. 938](#) [§ 2.30]

The burden of proof at the fact-finding stage in JIPS cases based on delinquency under [Wis. Stat. § 938.13\(12\)](#) is beyond a reasonable doubt. [Wis. Stat. §§ 938.243\(1\)\(h\), 938.31\(1\)](#). The burden of proof for all other JIPS cases under [Wis. Stat. § 938.13](#) is clear and convincing evidence. [Wis. Stat. § 938.243\(1\)\(h\)](#).

### D. [Postadjudicatory Stage](#) [§ 2.31]

Neither the Children's Code nor the Juvenile Justice Code explicitly articulates the burden of proof in disposition and extension hearings. However, the court of appeals has held that the burden is the greater weight of the credible evidence. *S.D.S. v. Rock Cnty. Dep't of Soc. Servs. (In the Interest of T.M.S.)*, 152 Wis. 2d 345, 357, 448 N.W.2d 282 (Ct. App. 1989).

**Note.** When the court decided *S.D.S.*, the statutory provisions governing disposition and extension hearings applied to both CHIPS and delinquency proceedings. [Wis. Stat. §§ 48.335, 48.365](#). The holding in *S.D.S.*, however, concerned only CHIPS proceedings and rested on the essentially civil nature of CHIPS cases, as well as on the lower burden of proof (clear and convincing evidence) in CHIPS fact-finding hearings. Compare *S.D.S.*, 152 Wis. 2d 345, with *United States v. Lee*, 818 F.2d 1052 (2d Cir. 1987) (adopting preponderance-of-evidence standard for federal-sentencing fact-finding), and *United States v. Haymond*, 139 S. Ct. 2369 (2019) (holding that preponderance-of-evidence standard for proving fact that would require mandatory minimum sentence violates defendant's rights to due process and to jury trial).

The burden of proof at a sanctions hearing is a preponderance of the evidence. [Wis. Stat. § 938.355\(6\)\(d\), \(6m\)](#). See [chapter 16](#), *infra*, for a discussion of sanctions hearings.

### E. Waiver Proceedings [§ 2.32]

A waiver proceeding under [Wis. Stat. § 938.18](#) consists of two stages. First, the court must find prosecutive merit. Although "prosecutive merit" is not specifically defined in the statute, it is generally considered to be a probable-cause determination similar to a preliminary hearing in adult criminal cases. [Wis. Stat. § 938.18\(4\)](#); *T.R.B. v. State (In the Int. of T.R.B.)*, 109 Wis. 2d 179, 190, 325 N.W.2d 329 (1982), *aff'g* 105 Wis. 2d 405, 314 N.W.2d 850 (Ct. App. 1981). After demonstrating prosecutive merit, the state must establish by clear and convincing evidence that the juvenile should be waived into adult court. [Wis. Stat. § 938.18\(6\)](#). See [chapter 14](#), *infra*, for a discussion of waiver proceedings.

## VIII. Notice as a Fundamental Right [§ 2.33]

As one scholar has stated:

Central to the term "due process of law" is the idea that government must act fairly and non-arbitrarily. When unfairness or arbitrariness infects the procedures used by government to deprive a person of life, liberty, or property, there may be a denial of procedural due process. The core requirements of procedural due process are notice and a fair hearing.

Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 Wis. L. Rev. 265, 267.

**Note.** The court cannot amend the petition to conform to the proof at the close of evidence without prior notice to the juvenile. Such an amendment violates [Wis. Stat. § 938.263\(2\)](#) and the juvenile's due-process right to notice. *State v. Tawanna H. (In the Int. of Tawanna H.)*, 223 Wis. 2d 572, 590 N.W.2d 276 (Ct. App. 1998).

Both the Children's Code and the Juvenile Justice Code mandate that parents, expectant mothers, and children receive notice of their rights (including the right to a hearing) at various stages of juvenile court intervention, beginning when an intake worker takes a child into custody. *But see* [Wis. Stat.](#) § 48.42(2m) (providing that notice not required to be given alleged father of child believed to be conceived as result of sexual assault). All counsel need to familiarize themselves with the notice requirements mandated throughout [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938.

**Note.** Notice is discussed in other chapters in relation to specific topics. *See, e.g.,* *infra* [chapters 5](#) (custody), [6](#) (intake inquiry), [8](#) (plea hearing), [10](#) (fact-finding hearing), [14](#) (waiver of juvenile court jurisdiction), [16](#) (motion for sanctions). For a discussion of notice requirements relating to victims and foster parents, see [chapter 15](#) (confidentiality), *infra*.

## IX. Substitution of Judge [§ 2.34]

[Wis. Stat.](#) §§ 48.29 and 938.29 provide statutory rights to substitution of judge for children in delinquency proceedings, waiver proceedings, CHIPS proceedings under [Wis. Stat.](#) § 48.13, JIPS proceedings under [Wis. Stat.](#) § 938.13, and TPR proceedings; for parents in CHIPS and TPR proceedings, as well as in JIPS proceedings other than those in which a delinquent act is alleged; and for expectant mothers and the guardians ad litem of unborn children in UCHIPS proceedings. [Wis. Stat.](#) §§ 48.29, 48.30(2), 48.422(5), 938.29, 938.30(2). The request for substitution in a CHIPS, UCHIPS, JIPS, delinquency, or TPR proceeding must occur before the end of the plea hearing or be waived. [Wis. Stat.](#) §§ 48.29(1), 48.30(2), 938.29(1), 938.30(2). The request for substitution in a waiver proceeding must be made before the close of the working day before the waiver hearing is scheduled or on the day of the waiver hearing itself. [Wis. Stat.](#) § 938.29(2). A substitution request under [Wis. Stat.](#) § 938.29(1) is adequate if signed by the juvenile's attorney. *State ex rel. Mateo D.O. v. Circuit Ct., 2005 WI App 85, 280 Wis. 2d 575, 696 N.W.2d 275*. The juvenile need not sign the request personally. *Id.*

In CHIPS, UCHIPS, and TPR cases, only one request for substitution can be filed in any one proceeding. [Wis. Stat.](#) § 48.29(1). By contrast, under [Wis. Stat.](#) § 938.29, juveniles in delinquency and JIPS cases, and parents in JIPS cases, other than JIPS cases based on delinquency, can request a substitution only if the judge has not previously entered a dispositional order with respect to that juvenile, or if the juvenile, parent, guardian, or legal custodian has not requested the substitution of judge in a previous proceeding. [Wis. Stat.](#) § 938.29(1g). In effect, [Wis. Stat.](#) § 938.29(1g) limits the statutory right of substitution to the first time the juvenile and the juvenile's parent appear in juvenile court in a [Wis. Stat.](#) ch. 938 proceeding.

## X. Standard Juvenile Court Forms [§ 2.35]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

### Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938 Wisconsin Records Management Committee

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose   |
|-------------------------|---------------------------|---|---|
| <a href="#">GF-152A</a> | Ch. 48                    | Petition for appointment of an attorney, affidavit of indigency | Petition used to seek appointment of counsel at county expense after individual has been deemed not indigent under state public defender guidelines |
| <a href="#">GF-152B</a> | Ch. 48                    | Order on petition for appointment of an attorney                | Order for appointment of an attorney  |
| <a href="#">IW-1724</a> | Both                      | Notice of hearing (juvenile)—Indian Child Welfare Act           | Notice informing interested persons of the scheduling of court proceedings in a case involving a child who is subject to ICWA                       |
| <a href="#">JG-1605</a> | Ch. 48                    | Petition for appointment of guardian (§ 48.977, Wis. Stats.)    | Petition to appoint a guardian for a person under age 18  |
| <a href="#">JD-1724</a> | Both                      | Notice of hearing (juvenile)                                    | Notice informing individuals involved in a case of a scheduled court proceeding   |
| <a href="#">JD-1736</a> | Both                      | Waiver of right to attorney (child/juvenile)                    | Statement signed by child or juvenile giving up the right to an attorney  |

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form                                   | Purpose   |
|--------------------------|---------------------------|--|---|
| <a href="#">JD-1798A</a> | Both                      | Order appointing guardian ad litem or attorney | Order for appointment of either attorney or guardian ad litem for child |

## Supplement Chapter 3

### Roles of the Parties in Juvenile Court

Book sections supplemented: [3.1](#), [3.2](#), and [3.7](#)

#### 3.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Sept. 2024, No. 825.

#### 3.2 Role of Defense Attorney

[Page 2: Amended second sentence in first paragraph after Historical Note in section](#)

[Wis. Stat.](#) § 48.233 requires the state public defender’s office to set up a pilot program in Brown, Outagamie, Racine, Kenosha, and Winnebago Counties to provide counsel to nonpetitioning parents in CHIPS proceedings. The pilot program began on July 1, 2018, and has been extended through June 30, 2025. 2023 Wis. Act 19.

#### 3.7 Role of Guardian ad Litem

[Page 5: Replaced first Comment in section](#)

**Comment.** Often the child who is the subject of a CHIPS matter is also the alleged victim in a criminal matter based on the same facts. Although the Children’s Code provides for participation by the GAL in juvenile court, it is unclear what role GALs have in participating in criminal proceedings involving a child victim. A victim has standing to participate in a criminal proceeding since the approval in 2020 by voters of the “Marsy’s Law” amendment to the Wisconsin Constitution. *See* Wis. Const. art. I, § 9m (regarding rights of crime victims). Thus, some courts have been appointing GALs as “lawful representatives” of child victims to represent child victims’ best interests in criminal matters. Although the constitutional amendment supports the standing of these “lawful representatives,” the law is silent on when it is appropriate for a GAL to be appointed as such and at whose expense.

## Chapter 3

### Roles of the Parties in Juvenile Court

#### I. [Scope of Chapter](#)

##### [§ 3.1]



In the Wisconsin Children’s Code ([Wis. Stat. ch. 48](#)) and the Wisconsin Juvenile Justice Code ([Wis. Stat. ch. 938](#)), the legislature carefully enumerates the powers and authorities of various parties to proceedings under each code. *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974). This chapter discusses the roles of the parties in proceedings under the Children’s Code and the Juvenile Justice Code, as statutes, case law, and other legal authorities define those roles.<sup>1</sup>

The parties in [Wis. Stat. ch. 48](#) and [Wis. Stat. ch. 938](#) proceedings have different, sometimes conflicting, interests. Parents’ interests stem from their fundamental right to rear children. Children have interests that stem from their right to parental bonds, including the right to financial, emotional, and physical care. *Waukesha Cnty. Dep’t of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, 124 Wis. 2d 47, 65, 368 N.W.2d 47 (1985). In delinquency and delinquency-related proceedings, children also have the right to liberty. The roles of defense counsel, prosecutor, guardian ad litem (GAL), the court, and individuals responsible for investigating the case and providing appropriate services must be seen in light of these fundamental interests.

**Note.** This chapter does not examine the roles of parties in children’s court proceedings under the private guardianship statute, [Wis. Stat. § 48.9795](#).

## II. [Role of Defense Attorney](#)

### [§ 3.2]

The Juvenile Justice Code defines *counsel* for parents and juveniles as “an attorney acting as adversary counsel,” [Wis. Stat. § 938.23\(1g\)](#); “[c]ounsel shall advance and protect the legal rights of the party represented ... [and] may not act as guardian ad litem for any party in the same proceeding,” [Wis. Stat. § 938.23\(1j\)](#). The Children’s Code provides a similar definition but also provides that, in children in need of protection or services (CHIPS) cases, counsel cannot act as a court-appointed special advocate (CASA) for any party in the same proceeding. [Wis. Stat. § 48.23\(1g\)](#); *see infra* § [3.20](#).

In nondelinquency proceedings, a defense attorney generally represents either the parent or the child. *See supra* [ch. 2](#). The court, at any time, upon request or on its own motion, may appoint counsel for the child or any party, unless the child or the party has or wishes to retain counsel of the child’s or the party’s own choosing. [Wis. Stat. § 48.23\(3\)](#). ([Wis. Stat. § 48.23\(2g\)](#) provides separately for the right to counsel for parents of Indian children removed from or placed outside the home.)

**Historical Note.** Before 2018, the Children’s Code provided that a court generally could not appoint counsel for any party, other than the child, in a child in need of protection or services (CHIPS) proceeding. *See, e.g.,* [Wis. Stat. § 48.23\(3\)](#) (2015–16). In *Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996), the Wisconsin Supreme Court held that this prohibition violated the separation-of-powers doctrine of the Wisconsin Constitution and the Due Process Clause of the U.S. Constitution, *see* U.S. Const. amend. XIV. By later amending [Wis. Stat. § 48.23\(3\)](#) with the enactment of 2017 Wis. Act 253, the Wisconsin Legislature formally removed the statutory prohibition against appointing counsel for a parent in a CHIPS proceeding.

[Wis. Stat. § 48.233](#) requires the state public defender’s office to set up a pilot program in Brown, Outagamie, Racine, Kenosha, and Winnebago Counties to provide counsel to nonpetitioning parents in CHIPS proceedings. The pilot program began on July 1, 2018 and has been extended through June 30, 2023. 2021 Wis. Act 58.

In delinquency, waiver, and sanction proceedings, the defense attorney represents the juvenile, who might be as young as 10 years old. In those settings, conflicts can easily arise between the attorney and the parent or between the parent and the juvenile throughout the proceedings, especially when the parent privately retains an attorney to represent the juvenile. While an attorney focuses on protecting the rights of the juvenile, a parent might think the juvenile should admit any wrongdoing and take whatever punishment awaits. The parent might not understand the reasons for distinguishing between activity the parent believes is wrongful and activity constituting a crime that the state can prove beyond a reasonable doubt was committed by the juvenile. The parent might also want to participate in all discussions between the attorney and the juvenile, a circumstance that can place the juvenile in a difficult position, caught between the wishes of the juvenile’s parents and the advice of his or her attorney.

In some cases, defense counsel may represent a juvenile younger than 10 years old who allegedly is in need of protection or services based on a delinquent act. *See* [Wis. Stat. § 938.13\(12\)](#). Defense counsel’s role in these cases can prove particularly difficult because of the juvenile’s age. Especially when representing younger juveniles, the attorney must listen to parental concerns and vigorously represent the juvenile. In discussing the case with the client, defense counsel should be aware that the juvenile might be expressing a parent’s views of the case, resulting in a difficult situation that defense counsel must approach with sensitivity. The juvenile might feel that avoiding conflict with the parent is more important than pursuing the juvenile’s legal rights.

Aside from potential conflicts with parents, representing children offers other unique challenges. Many people, let alone a 10-year-old child, may have difficulty understanding legal principles. Consequently, the attorney should spend as much time with the child as is necessary for the child to understand the child's rights and any possible defenses to a delinquency petition. For example, a juvenile might not understand the right to remain silent and the presumption of innocence, i.e., that it is okay to not to admit guilt and to compel the state to prove the juvenile's guilt beyond a reasonable doubt. Of course, many children will decide to waive their right to a trial, but attorneys can help ensure that children make the waiver knowingly and voluntarily.

Children tend to not assert themselves. Therefore, an attorney might feel tempted to substitute the attorney's judgment for the child's judgment. Defense counsel needs to impress upon the child that the child can make decisions about the case. The attorney must be an advocate for the child and leave the best interests of the child up to the GAL, the social workers, and the court.

The IJA-ABA Joint Commission on Juvenile Justice Standards publication *Standards Relating to Counsel for Private Parties*, relating to all juvenile court proceedings (both delinquency and nondelinquency), provides that the client's interests are paramount. IJA-ABA Joint Comm'n on Juv. Just. Standards, *Standards Relating to Counsel for Private Parties* § 3.1 (1980) [hereinafter *IJA-ABA Standards Relating to Counsel for Private Parties*]. Counsel must abide by the client's determination (after full consultation with counsel) of the client's interests, including whether to admit or deny the allegations in the petition. *Id.* Prompt action by counsel in the early stages of the process provides the only way to adequately protect the rights of the client. *Id.* § 4.1. The standards call for counsel's intervention as soon as possible at all stages of the proceedings "except where temporary emergency action is involved and immediate participation of counsel is not practicable." *Id.* §§ 2.3–4.

Although the standards point to the importance of early representation, under the Juvenile Justice Code, a juvenile's *statutory* right to counsel in delinquency proceedings does not attach until the filing of the petition or the scheduling of the detention hearing. In delinquency proceedings, however, a juvenile has a *constitutional* right to counsel when taken into custody. *See supra* [ch. 2](#) (rights of parties).

In sum, the role of defense counsel in juvenile court is similar to defense counsel's role in criminal or civil proceedings. In early stages of the juvenile justice process, defense counsel's involvement could yield for the child an early disposition and diversion from formal action. Defense counsel's participation might also result in locating nonlegal assistance for the client within and outside the court system:

Such activities require a sense of professional responsibility to the client, the skill to present the client's position in legal and administrative forums, and the ability both to investigate that which seems good for the client and to distinguish the attorney's opinion from the position that the client is entitled by law to take. These, among others, are functions for which lawyers are or should be specially qualified and which, as experience has amply demonstrated, are not readily assumed by other available representatives for juvenile court clientele.

*IJA-ABA Standards Relating to Counsel for Private Parties, supra*, § 1.1 commentary at 6.

As with an adult client, a lawyer representing a child must zealously represent the client within the bounds of the law, preserving the client's confidences, exercising independent professional judgment on behalf of the client, and providing competent representation. *See SCR* 20:1.1, *SCR* 20:1.2, *SCR* 20:1.6. In *Miller v. Quatsoe*, 332 F. Supp. 1269 (E.D. Wis. 1971), the court described the role of counsel for a child in a waiver proceeding as requiring investigation of the child's entire life and devising a plan, short of waiver, for the child's future. *Id.* at 1275.

### III. Role of Prosecutor [§ 3.3]

#### A. Types of Cases Under [Wis. Stat. Ch. 48](#) [§ 3.4]

Either the district attorney or the corporation counsel's office prosecutes CHIPS cases, unborn children in need of protection or services (UCHIPS) cases, and termination of parental rights (TPR) cases. [Wis. Stat.](#) §§ 48.09(5), (6), 48.14(1).

#### B. Types of Cases Under [Wis. Stat. Ch. 938](#) [§ 3.5]

Under [Wis. Stat.](#) § 938.09, the district attorney represents the interests of the public in all delinquency proceedings. [Wis. Stat.](#) § 938.09(1). The city, village, or town attorney prosecutes matters involving city, village, or town ordinance violations. [Wis. Stat.](#) § 938.09(3). "[A]n appropriate person designated by the county board of supervisors" prosecutes county ordinance violations under [Wis. Stat.](#) § 938.125. [Wis. Stat.](#) § 938.09(4).

The district attorney or, if designated by the county board of supervisors, the corporation counsel, prosecutes juvenile in need of protection or services (JIPS) cases under [Wis. Stat.](#) § 938.13. [Wis. Stat.](#) § 938.09(5).

**Comment.** In some counties, private attorneys have been appointed to represent parents who want to file a JIPS petition against their children. It is questionable whether courts should allow this, because it essentially puts the appointed counsel in the position of prosecuting the juvenile.

### C. Exercise of Prosecutorial Discretion [§ 3.6]

Whether performed by the corporation counsel or the district attorney, the prosecutor's role begins with reviewing the intake worker's recommendations to determine what action, if any, to take. *See infra* §§ 3.12–.17 (role of intake worker); *see also* [Wis. Stat.](#) §§ 59.42 (duties of corporation counsel), 978.05 (duties of district attorney). Even if the intake worker recommends informally handling a case or closing it altogether, the prosecutor can ignore the recommendation and file a petition. [Wis. Stat.](#) §§ 48.24(5), 938.24(5). As with charging decisions made by prosecutors in adult criminal cases, prosecutors have discretion to decide what charges, if any, to file. [State v. Burke](#), 153 Wis. 2d 445, 451, 451 N.W.2d 739 (1990). A prosecutor does not have unbounded discretion, however, and the legislature can limit that discretion. *Id.*; [C.A.K. v. State \(In the Int. of C.A.K.\)](#), 154 Wis. 2d 612, 623–24, 453 N.W.2d 897 (1990) (holding that by failing to follow limitations of filing petition under former [Wis. Stat.](#) § 48.25(2)(a), the state surrendered its right to proceed against juvenile); *see also* [Wis. Stat.](#) § 938.25(2)(a). In addition, when challenged, a prosecutor must demonstrate that he or she in fact exercised discretion—for example, in deciding to file a petition rather than handling a particular case informally. *See* [McCleary v. State](#), 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971), for a discussion of review of discretionary acts.

The IJA-ABA Joint Commission on Juvenile Justice Standards publication *Standards Relating to Prosecution* has characterized the juvenile prosecutor's primary duty as “seek[ing] justice” by representing the state “without losing sight of the philosophy and purpose of the juvenile court.” IJA-ABA Joint Comm'n on Juv. Just. Standards, *Standards Relating to Prosecution* § 1.1 (1980). To this end, an element of detachment should be maintained between the prosecutor and the court. *Id.* § 3.2 commentary. As officers of the court in the course of performing their duties, juvenile prosecutors will become well acquainted with all the juvenile court judges in their jurisdiction. They can work together in accomplishing the goals of the Juvenile Justice Code. Nevertheless, juvenile prosecutors must guard against the possibility that they might be viewed by the community as being associates of the juvenile court judges. *Id.*

## IV. [Role of Guardian ad Litem](#)

### [§ 3.7]

The role of the GAL is outlined generally in [Wis. Stat.](#) §§ 48.235 and 938.235. The GAL must be an attorney and cannot appear as counsel or CASA for any other party in the proceeding. The GAL cannot be an interested party, represent an interested party, or be related to an interested party. [Wis. Stat.](#) §§ 48.235(2), 938.235(2); *see also* [SCR](#) ch. 35 (specifying conditions that must be met for an attorney to be eligible to accept GAL appointments for minors).

The GAL serves as an advocate for the best interests of the person or unborn child for whom the appointment is made. [Wis. Stat.](#) §§ 48.235(3), 938.235(3). Unlike adversary counsel, the GAL must consider, but need not abide by, the person's wishes. If the person's wishes come into conflict with the GAL's view of the person's best interests, the GAL must advise the court, and the court can appoint adversary counsel for the person. [Wis. Stat.](#) §§ 48.235(3), 938.235(3); *see also* [Wis. Stat.](#) § 48.23(3) (stating that at any time, upon request or on its own motion, court can appoint counsel for child or any party, unless child or party has or wishes to retain counsel of his or her own choosing). The GAL has none of the rights or duties of a general guardian. [Wis. Stat.](#) §§ 48.235(3), 938.235(3); *see* [Wis. Stat.](#) §§ 48.02(8), 48.023, 938.02(8).

**Comment.** Often the child who is the subject of a CHIPS matter is also the alleged victim in a criminal matter based on the same facts. Although the Children's Code provides for participation by the GAL in juvenile court, it is unclear whether a GAL would have standing to participate in a criminal proceeding involving a child victim. A victim has standing to participate in a criminal proceeding since the approval in 2020 by voters of the “Marsy's Law” amendment to the Wisconsin Constitution. *See* Wis. Const. art. I, § 9m (regarding rights of crime victims). Thus, it is possible that a GAL already appointed in a CHIPS matter might be able to represent the child victim's best interest in the criminal matter. *See* [State v. Johnson](#), 2020 WI App 73, [394 Wis. 2d 807](#), 951 N.W.2d 616 (review granted).

Unless granted leave by the court, in CHIPS and JIPS cases, the GAL or a trained designee of the GAL must meet with the child and, if the child is old enough to communicate, interview the child to determine the child's concerns regarding placement. [Wis. Stat.](#) §§ 48.235(3)(b), 938.235(3)(b). In UCHIPS cases, the GAL or a trained designee must meet with the expectant mother of the unborn child. [Wis. Stat.](#) § 48.235(3)(b). The GAL is required to assess the appropriateness and safety of the child's or unborn child's environment. [Wis. Stat.](#) §§ 48.235(3)(b), 938.235(3)(b). The GAL must make specific recommendations to the court about what is in the child's or unborn child's best interests. [Wis. Stat.](#) §§ 48.235(3)(b), 938.235(3)(b).

The juvenile court may appoint a GAL “in any appropriate matter.” [Wis. Stat.](#) §§ 48.235(1)(a), 938.235(1)(a). This includes matters in which a minor seeks a waiver of parental consent for abortion. [Wis. Stat.](#) § 48.235(1)(d). In this context, the GAL assists the court in determining whether the minor is sufficiently mature and well-informed to make the abortion decision on her own and whether the abortion is in the minor’s best interests. *See generally infra* [ch. 18](#). The court must appoint a GAL for

1. A minor parent petitioning for voluntary TPR, [Wis. Stat.](#) §§ 48.23(2), 48.235(1)(b), unless the minor parent is entitled to counsel as a parent of an Indian child, *see* [Wis. Stat.](#) § 48.23(2g);
2. A child who is the subject of a proceeding to terminate parental rights, [Wis. Stat.](#) § 48.235(1)(c);
3. A child who is the subject of a contested adoption proceeding, *id.*;
4. A child who is the subject of a guardianship proceeding under [Wis. Stat.](#) § 48.977, *id.*;
5. A child who is the subject of a standby guardianship proceeding under [Wis. Stat.](#) § 48.978, *id.*;
6. A child alleged or found to be in need of protection or services if the court has ordered, or a request or recommendation asks the court to order, the child placed outside the home, even in situations in which the case is resolved by consent decree, [Wis. Stat.](#) §§ 48.235(1)(e), 938.235(1)(e);
7. Any unborn child alleged or found to be in need of protection or services, [Wis. Stat.](#) § 48.235(1)(f); and
8. A parent who is the subject of a TPR proceeding if any physical, psychological, mental, or developmental examination or alcohol or other drug abuse assessment under [Wis. Stat.](#) § 48.295(1) “shows that the parent is not competent to participate in the proceeding or to assist his or her counsel or the court in protecting the parent’s rights in the proceeding.”

[Wis. Stat.](#) § 48.235(1)(g).

**Comment.** An unusual situation arose in [E.H. v. Milwaukee County \(In the Interest of T.L.\)](#), 151 Wis. 2d 725, 445 N.W.2d 729 (Ct. App. 1989), which highlights the differences in the roles of adversary counsel and the GAL. In *E.H.*, adversary counsel for a parent in a contested CHIPS proceeding suspected that parent’s incompetency and requested the appointment of a GAL. The circuit court ordered the appointment of a GAL but then allowed the GAL to admit to the petition on the parent’s behalf despite the parent’s express wish to contest the petition. The court of appeals reversed the dispositional order, holding that the circuit court erred in allowing adversary counsel to defer to the GAL’s decision not to contest the petition, thus preempting the parent’s wishes. Although not raised as an issue in the case, the court held that [Wis. Stat.](#) § 48.23(2) and (3) allowed for simultaneous appointment of adversary counsel and a GAL. *E.H.*, 151 Wis. 2d at 735. Although the juvenile court has wide discretion in appointing GALs, it is difficult to understand why, in *E.H.*, the appointment was appropriate. It is also difficult to understand why adversary counsel could ever appropriately request appointment of a GAL while knowing that the client desires to contest the petition and that the GAL must advocate the course of action the GAL believes will best serve the best interests of the individual for whom the GAL is appointed, even if that course of action conflicts with the individual’s express preferences.

The GAL represents the interests of the child or unborn child in a fact-finding hearing by developing the facts about whether grounds exist for CHIPS, UCHIPS, or TPR. At this stage, however, the GAL cannot argue for the best interests of the child or unborn child, because the standard has relevance only to disposition once a child or unborn child has been found in need of protection and services. [Waukesha Cnty. Dep’t of Soc. Servs. v. C.E.W. \(In the Int. of C.E.W.\)](#), 124 Wis. 2d 47, 64, 368 N.W.2d 47 (1985). (Although *C.E.W.* involved the fact-finding hearing in a TPR case, its holding applies equally to CHIPS or UCHIPS proceedings. See [chapters 10](#) (fact-finding hearing) and [17](#) (TPR), *infra*, for further discussion of the role of the GAL at the fact-finding stage.) As an advocate for the best interests of the child, a GAL has the right—and obligation—to interview the client and to investigate the case. At the fact-finding hearing, the GAL will call witnesses on behalf of the client and cross-examine other witnesses. [de Montigny v. de Montigny](#), 70 Wis. 2d 131, 138, 233 N.W.2d 463 (1975).

A GAL has the authority to file CHIPS, UCHIPS, and JIPS petitions, under [Wis. Stat.](#) §§ 48.13, 48.133, and 938.13, or petitions under [Wis. Stat.](#) §§ 48.14 and 938.14, including those seeking TPR. [Wis. Stat.](#) §§ 48.25(1), 938.25(1); *see also* [Wis. Stat.](#) §§ 48.235(4)(a)3., 938.235(4)(a)3.

After a child has been found to be in need of protection and services, the GAL can participate in the following:



1. Permanency planning, [Wis. Stat.](#) §§ 48.235(4)(a)1., 938.235(4)(a)1.;
2. Postdispositional proceedings, such as (a) changes in placement, [Wis. Stat.](#) §§ 48.235(4)(a)2., 938.235(4)(a)2., (b) revisions and extensions, [Wis. Stat.](#) §§ 48.235(4)(a)4., 5., 938.235(4)(a)4., 5., and (c) appeals of TPR judgments, [Wis. Stat.](#) §§ 48.235(4)(a)7., 938.235(4)(a)7.;
3. Any of the other matters relating to children enumerated in [Wis. Stat.](#) §§ 48.14 and 938.14, [Wis. Stat.](#) §§ 48.235(4)(a)3., 938.235(4)(a)3.; and
4. Any other duties consistent with [[Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938],” [Wis. Stat.](#) §§ 48.235(4)(a)8., 938.235(4)(a)8.

Under [Wis. Stat.](#) §§ 48.235(4)(a)6. and 938.235(4)(a)6., the GAL may bring petitions under [Wis. Stat.](#) § 813.122 or [Wis. Stat.](#) § 813.125 (temporary restraining orders and injunctions). Under [Wis. Stat.](#) §§ 48.235(4)(a)7g. and 938.235(4)(a)7g., the GAL may bring petitions under [Wis. Stat.](#) § 48.977 (appointment of guardian for certain CHIPS or JIPS children). Under [Wis. Stat.](#) §§ 48.235(4)(a)7m. and 938.235(4)(a)7m., the GAL may bring a motion under [Wis. Stat.](#) § 767.80 (determination of paternity).

A GAL representing a minor parent in a voluntary TPR proceeding has the responsibility of advising the parent of his or her rights and of determining whether the parent voluntarily consents to the termination. [Wis. Stat.](#) § 48.235(5).

A GAL who has been appointed for a parent who is not competent to participate in a contested TPR proceeding must provide information to the court relating to the parent’s competency to participate in the proceeding and must provide assistance to the court and the parent’s counsel in protecting the parent’s rights. [Wis. Stat.](#) § 48.235(5m)(a). “The guardian ad litem may not participate in the proceeding as a party, and may not call witnesses, provide opening statements or closing arguments, or participate in any activity at trial that is required to be performed by the parent’s adversary counsel.” [Wis. Stat.](#) § 48.235(5m)(b).

For additional guidance on the role of GALs in children’s court proceedings, see Mary Beth Arnett et al., *The Guardian ad Litem Handbook* ch. 4 (State Bar of Wis. 5th ed. 2018 & Supp.).

## V. Role of Juvenile Court [§ 3.8]

### A. In General [§ 3.9]

[Wis. Stat.](#) §§ 48.02(2m) and 938.02(2m) define *court* (when that term is used without further qualification) as the court assigned to exercise jurisdiction under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938. [Wis. Stat.](#) §§ 48.02(10) and 938.02(10) similarly define *judge* (again, when used without further qualification) as the judge of the court assigned to exercise jurisdiction under both chapters. The language used under various statutory provisions has significance because, although many proceedings can be heard by a circuit court commissioner, certain proceedings must be heard by a juvenile court judge. Therefore, the term “court” includes both circuit court commissioners and juvenile court judges, but the term “judge” refers only to the juvenile court judge.

In general, a legislatively created court (such as the juvenile court) cannot act without express statutory authority, except for those actions falling within a court’s inherent or equitable authority. *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980); *D.H. v. State (In the Int. of D.H.)*, 76 Wis. 2d 286, 251 N.W.2d 196 (1977); *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974). As the Wisconsin Supreme Court explained in *Breier v. E.C. (In the Interest of E.C.)*, 130 Wis. 2d 376, 390, 387 N.W.2d 72 (1986), the Children’s Code “does not confer unfettered discretion” on the juvenile court “to craft unique and unspecified remedies in juvenile matters.” The court cannot invoke the “best interests of the child” standard to justify a result not statutorily authorized. This limitation applies under the Juvenile Justice Code as well.

Even for those decisions within the court’s authority, the record must demonstrate that the juvenile court judge or circuit court commissioner properly exercised his or her discretion. As with any discretionary act, the court must give reasons based on proper factors for its decision. *Racine Cty. v. Skow (In the Int. of J.A.)*, 138 Wis. 2d 483, 492–93, 406 N.W.2d 372 (1987); *State v. Hutnik*, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968) (holding that circuit court’s exercise of discretion based on error of law is beyond limits of discretion).

### B. Juvenile Court Judge [§ 3.10]

One of the major differences between the role of the judge in juvenile court proceedings and the role of the judge in criminal court proceedings lies in the juvenile court judge’s authority to become involved at the investigatory stage. Under [Wis. Stat.](#) §§ 48.10 and 938.10,

the judge can act as the intake worker. *See infra* §§ [3.12–.17](#) (role of intake worker). When a judge acts as intake worker, however, and refers the case for the filing of a formal petition, makes an informal disposition, enters into a deferred prosecution, or enters a citation, that judge cannot participate further in the proceedings. [Wis. Stat.](#) §§ 48.10, 938.10. See [chapter 6](#) (intake inquiry), *infra*, for a discussion of informal agreements under [Wis. Stat.](#) ch. 48 and of deferred prosecutions under [Wis. Stat.](#) ch. 938.

The IJA-ABA Joint Commission on Juvenile Justice Standards publication *Standards Relating to Court Organization and Administration* (1980) acknowledges the difficulty of providing precise guidelines for the conduct of juvenile court judges. In general, however, the judge has the duty to ensure that proceedings are conducted with dignity and that parties can easily understand legal concepts used in court. Above all, the judge should ensure that proceedings are fair and conducted in a manner consistent with due process: “The judge is the guardian and not the opponent of constitutional protections for the juvenile. All parties should be treated with courtesy and dignity. Judges must curtail their desire for the court to directly intervene in the life of a child or family when a jurisdictional basis is lacking.” IJA-ABA Joint Comm’n on Juv. Just. Standards, *Standards Relating to Court Organization and Administration* § 3.2 commentary at 30 (1980) [hereinafter *IJA-ABA Standards Relating to Court Organization and Administration*].

A juvenile court judge’s demonstrated respect for the law will promote effective representation by both the defense and the prosecution and will help ensure compliance by court and agency personnel with the requirements of the law. *Id.* § 3.4(D) commentary at 35.

Later chapters of this book address the role of the juvenile court judge at particular stages of proceedings under the Children’s Code and the Juvenile Justice Code. See also [Wis. Stat.](#) ch. 753 and [Wis. Stat.](#) ch. 757, which govern the operation of circuit courts generally.

### C. Circuit Court Commissioners [§ 3.11]

Circuit court commissioners are appointed by the chief judge of the administrative district. [Wis. Stat.](#) § 757.68(3m); [SCR](#) 75.02. The commissioner must be an attorney licensed to practice law in any state for at least three years immediately before the appointment. [SCR](#) 75.02(1).

[Wis. Stat.](#) § 757.69(1)(g) delineates the only actions circuit court commissioners can take in child-related cases. Under both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, the court commissioner can

1. Issue summonses and warrants, [Wis. Stat.](#) § 757.69(1)(g)1.;
2. Order the release or detention of children or expectant mothers of unborn children taken into custody, [Wis. Stat.](#) § 757.69(1)(g)2.;
3. Conduct detention and shelter care hearings, [Wis. Stat.](#) § 757.69(1)(g)3.;
4. Conduct preliminary appearances, [Wis. Stat.](#) § 757.69(1)(g)4.;
5. Conduct uncontested CHIPS, UCHIPS, delinquency, JIPS, and waiver proceedings, [Wis. Stat.](#) § 757.69(1)(g)5.;
6. Enter into consent decrees or amended consent decrees, [Wis. Stat.](#) § 757.69(1)(g)6.;
7. Conduct proceedings related to child abuse and harassment restraining orders and injunctions in situations in which the respondent is a child, [Wis. Stat.](#) § 757.69(1)(g)7.;
8. Conduct hearings under [Wis. Stat.](#) §§ 48.21, 48.217, 938.21, 938.217, or 48.213 and thereafter order a child or an expectant mother of an unborn child to be held in or released from custody, [Wis. Stat.](#) § 757.69(1)(g)8., 9.;
9. Conduct plea hearings and prehearing conferences, [Wis. Stat.](#) § 757.69(1)(g)10., 11.;
10. Issue orders requiring compliance with deferred prosecution agreements, [Wis. Stat.](#) § 757.69(1)(g)12.;
11. Conduct proceedings on petitions or citations alleging a violation of a civil law or ordinance under [Wis. Stat.](#) § 938.125, [Wis. Stat.](#) § 757.69(1)(g)13.;
12. Conduct permanency reviews and hearings, [Wis. Stat.](#) § 757.69(1)(g)14.; and

13. Conduct emergency in-home to out-of-home changes-in-placement hearings under [Wis. Stat. § 48.357\(2\)\(b\)](#) or [Wis. Stat. § 938.357\(2\)\(b\)](#), [Wis. Stat. § 757.69\(1\)\(g\)](#)15.

Under [Wis. Stat. § 757.69\(1m\)\(b\)](#), a court commissioner can approve consent decrees, order compliance with deferred prosecution agreements, and order dispositions in uncontested CHIPS, UCHIPS, delinquency, and JIPS cases.

In addition, [Wis. Stat. § 757.69\(1m\)](#) states the situations in which a court commissioner cannot act in a child-related proceeding. A court commissioner cannot conduct (1) contested fact-finding or dispositional hearings, except on petitions or citations for violation of a civil law or ordinance, [Wis. Stat. § 757.69\(1m\)\(a\)](#); (2) hearings for TPR or adoptions, [Wis. Stat. § 757.69\(1m\)\(c\)](#); (3) hearings seeking appointment of a guardian for certain CHIPS or JIPS children or as a standby guardian, [Wis. Stat. § 757.69\(1m\)\(e\)](#) (court commissioners are also not permitted to make findings or issue orders in these proceedings); and (4) contested waiver hearings, [Wis. Stat. § 757.69\(1m\)\(f\)](#). Additionally, a court commissioner cannot make any dispositional order—contested or not—placing a delinquent juvenile in a Type 2 residential care center for children and youth under [Wis. Stat. § 938.34\(4d\)](#), the serious juvenile offender program under [Wis. Stat. § 938.34\(4h\)](#), or a secured residential care center for children and youth under the supervision of the county department under [Wis. Stat. § 938.34\(4m\)](#). [Wis. Stat. § 757.69\(1m\)\(g\)](#).

**Note.** As of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, Wisconsin does not currently have any secured residential care centers for children and youth under the supervision of a county department under [Wis. Stat. § 938.34\(4m\)](#), *as amended* by 2017 Wis. Act 185 and 2019 Wis. Act 8. Thus, the Type 1 juvenile correctional facilities at Lincoln Hills School for Boys and Copper Lake School for Girls were not closed by January 1, 2021, as anticipated by 2017 Wis. Act 185 (nor were they closed by the extended deadline of July 1, 2021, under 2019 Wis. Act 8) for the transition to a new facility, so courts continue to operate as though the effective date for the closure has not occurred. *Cf.* [Wis. Stat. § 938.34\(4m\)](#) (2019–20) (permitting placement of juvenile in juvenile correctional facility under supervision of Department of Corrections before January 1, 2021); *see also* 2021 Wis. Act 252 (authorizing state to contract additional debt for the purpose of constructing a new Type 1 juvenile correctional facility in Milwaukee County); *infra* [ch. 11](#). Court commissioners cannot make a dispositional order placing a delinquent juvenile at Lincoln Hills or Copper Lake under any circumstances.

Finally, a court commissioner cannot make changes in placement or order revisions or extensions of dispositional orders unless they are uncontested or made pursuant to matters under [Wis. Stat. § 938.125](#) or as permitted under [Wis. Stat. § 757.69\(1\)\(g\)6., 8., 9., and 15.](#) [Wis. Stat. § 757.69\(1m\)\(d\)](#).

At the request of any party, any decision by a circuit court commissioner must be reviewed by the juvenile court judge. [Wis. Stat. § 757.69\(8\)](#).

## VI. Role of Intake Worker [§ 3.12]

### A. In General [§ 3.13]

The powers and duties of intake workers appear in [Wis. Stat. §§ 48.067, 48.08, 938.067, and 938.08](#). Intake workers work in several capacities for the juvenile court: police officer or deputy sheriff, investigator, counselor, magistrate, and advisor to the juvenile court. *See* [Wis. Stat. §§ 48.06\(1\)\(a\)2., \(2\)\(a\), 938.06\(1\)\(a\)2., \(2\)\(a\)](#).

### B. Intake Worker as Police Officer or Deputy Sheriff and Magistrate [§ 3.14]

Intake workers are on call 24 hours per day, seven days per week, to screen children and adult expectant mothers of unborn children taken into custody but not released, and to determine whether, and where, to continue holding them in physical custody. [Wis. Stat. §§ 48.067\(1\), \(3\), \(4\), 938.067\(1\), \(3\), \(4\)](#). Intake workers have the statutory power of police officers and deputy sheriffs to take a child into custody if the child comes voluntarily, is sick or injured, or faces immediate danger that requires removal from the child's surroundings. [Wis. Stat. §§ 48.08\(2\), 938.08\(2\)](#). Intake workers also have the statutory power to take into custody juveniles who violate a condition of a dispositional order, aftercare supervision, or the intensive supervision program while the alleged violation is being investigated or as a consequence of that violation. [Wis. Stat. §§ 938.067\(8m\), 938.355\(6d\)\(a\), \(b\), \(c\), 938.534\(1\)\(b\), \(c\)](#).

The court of appeals has held that the intake worker does not have responsibility for investigating a juvenile's alleged crime. *J.W.T. v. State (In the Int. of J.W.T.)*, 159 Wis. 2d 754, 761–62, 465 N.W.2d 520 (Ct. App. 1990). The court also acknowledged, however, that the intake worker must evaluate information about the alleged crime to make a recommendation to the district attorney regarding whether to file

a petition. Furthermore, the intake worker must determine whether probable cause exists to believe that the juvenile has committed a delinquent act, one of the criteria for holding a juvenile in juvenile detention. [Wis. Stat.](#) § 938.208(1).

**Comment.** Under the Fourth Amendment, the person issuing an arrest warrant or search warrant must qualify as a neutral and detached magistrate—that is, “must be severed and disengaged from activities of law enforcement.” Sheldon R. Shapiro, Annotation, *Requirement, Under Federal Constitution, That Person Issuing Warrant for Arrest or Search Be Neutral and Detached Magistrate—Supreme Court Cases*, 32 L. Ed. 2d 970, 971 (1973). Because an intake worker investigates the offense alleged in a delinquency case and, in certain circumstances, can even take the juvenile into custody, the intake worker might not always manifest the neutrality and detachment required by the Fourth Amendment when deciding to hold a juvenile in custody. For further discussion of this issue, see [chapter 6](#) (intake inquiry), *infra*.

If a child is taken into custody and not immediately released, the intake worker must interview the child or the expectant mother of an unborn child (if possible) and other concerned parties (if appropriate). [Wis. Stat.](#) §§ 48.067(2), 48.20(2)(ag), 938.067(2), 938.20(2)(ag). If it is impossible to interview the child, the intake worker must interview the child’s parent or a “responsible adult.” [Wis. Stat.](#) §§ 48.067(2), 938.067(2). If it is impossible to interview the adult expectant mother of an unborn child, the intake worker must interview an adult relative or friend of the adult expectant mother. [Wis. Stat.](#) § 48.067(2). A child cannot be placed in a juvenile detention facility without an intake worker first interviewing the child. [Wis. Stat.](#) §§ 48.067(2), 938.067(2). (Under [Wis. Stat.](#) §§ 48.02(10r) and 938.02(10r), a *juvenile detention facility* is defined as “a locked facility approved ... under [\[Wis. Stat. §\] 301.36](#) for the secure, temporary holding in custody” of children. See *infra* [ch. 5](#) (physical custody).)

**Caveat.** If located too far from the child’s place of detention or if the hour is “unreasonable,” and if the child meets the criteria for detention in a juvenile detention facility, the intake worker can authorize secure holding of the child while the worker is en route or until 8:00 a.m. of the morning after the night on which the child was taken into custody. The intake worker can authorize this detention, however, only after first consulting with the law enforcement officer who took the child into custody. [Wis. Stat.](#) §§ 48.067(2), 938.067(2). Under [Wis. Stat.](#) §§ 48.067(2) and 938.067(2), “unreasonable” must be defined by “written court intake rules.” [Wis. Stat.](#) §§ 48.208 and 938.208 contain the criteria for holding a child in a juvenile detention facility.

### C. Intake Worker as Investigator and Advisor to Corporation Counsel and District Attorney [§ 3.15]

In addition to providing emergency on-call service, the intake worker conducts intake inquiries, investigating referrals to determine whether to request the filing of a petition or the informal handling of a case. [Wis. Stat.](#) §§ 48.067(6), 938.067(6). The intake worker must advise parents and children at the intake inquiry of their rights under [Wis. Stat.](#) §§ 48.243 and 938.243. See *infra* [ch. 6](#). The intake worker also must advise victims of their rights, such as the right to restitution, and of certain procedures, such as those for obtaining juveniles’ police records. See [Wis. Stat.](#) §§ 938.067(6g), 938.346(1), (1m).

### D. Intake Worker as Counselor [§ 3.16]

The intake worker must have the qualifications to perform entry-level social work in a county department and must have successfully completed the prescribed intake training. [Wis. Stat.](#) §§ 48.06(1)(am)1., (2)(b), 938.06(1)(am)1., (2)(b). The rules for intake worker training appear in [Wis. Admin. Code](#) ch. DCF 82. Intake workers are not necessarily required to have a degree in “social work”; rather, they are persons with degrees in human service-related fields and are trained upon hire to perform in accordance with state law and practice standards. Those intake workers responsible for investigating or treating child abuse or neglect or unborn child abuse must undergo additional training in this area. [Wis. Stat.](#) § 48.06(1)(am)3., (2)(c). As counselor, the intake worker can provide crisis counseling during the intake interview, if appropriate, [Wis. Stat.](#) §§ 48.067(5), 938.067(5), and can make referrals to other agencies, if necessary or desirable, [Wis. Stat.](#) §§ 48.067(7), 938.067(7). For those counties taking part in a program under [Wis. Stat.](#) § 48.547 or [Wis. Stat.](#) § 938.547, the intake worker must conduct multidisciplinary screens of children and expectant mothers of unborn children to determine whether they need drug or alcohol abuse treatment. [Wis. Stat.](#) §§ 48.067(6m), 48.547(3), 938.067(6m), 938.547(3). ([Wis. Stat.](#) §§ 48.547(1) and 938.547(1) authorize programs “to develop intake and court procedures that screen, assess and give new dispositional alternatives” for children and expectant mothers of unborn children with drug and alcohol problems.) At the request of a minor who claims to be pregnant, the intake worker must assist the child in preparing a petition to initiate proceedings under [Wis. Stat.](#) § 48.375(7) and file the petition with the clerk of circuit court. [Wis. Stat.](#) § 48.067(7m). [Wis. Stat.](#) § 48.375(7) governs judicial waiver of parental consent for minors seeking abortions. See *generally infra* [ch. 18](#) (parental consent for abortion).

### E. Intake Worker as Advisor to the Court [§ 3.17]



The intake worker must keep a written record of the investigations the intake worker undertakes and must submit written reports to the judge. [Wis. Stat.](#) §§ 48.08(1), 938.08(1). The intake worker must also perform any other functions ordered by the court (including making interim recommendations to the court concerning children and unborn children and their expectant mothers awaiting final disposition in CHIPS, UCHIPS, JIPS, and delinquency cases) and assist the court in developing written policies. [Wis. Stat.](#) §§ 48.067(8), (9), 938.067(8), (9).

**Comment.** The IJA-ABA Joint Commission on Juvenile Justice Standards publication *Standards Relating to Court Organization and Administration* (1980) discusses the problems inherent in a system that makes intake workers part of the judicial branch of government rather than part of an agency in the executive branch, such as the Department of Children and Families (DCF). Because the juvenile court reviews intake decisions, “[j]udgments are made more independently when the services assessed are not within the legal-administrative responsibility of the reviewing judge.” IJA-ABA *Standards Relating to Court Organization and Administration*, *supra* § 3.10, § 1.2 commentary at 16. In addition, in some courts, due process has been jeopardized when juvenile court judges have conferred informally with intake workers about whether a case should be handled formally or informally or about the progress of “juveniles upon whom they will later sit in judgment.” *Id.*

## VII. Role of Social Service Agency and Department of Corrections [§ 3.18]

The roles of the Department of Corrections, the DCF, and other agencies involved in juvenile court proceedings are addressed in chapters discussing specific proceedings. In general, however, these agencies (1) advise the juvenile court regarding dispositions, (2) provide services to children and parents, (3) ensure implementation of the conditions of the dispositional order, and (4) assist the juvenile court in implementing the objectives of the Children’s Code and the Juvenile Justice Code. [Racine Cnty. v. Skow \(In the Int. of J.A.\)](#), 138 Wis. 2d 483, 491–92, 406 N.W.2d 372 (1987). An agency providing dispositional services to the court under [Wis. Stat.](#) § 48.069 or [Wis. Stat.](#) § 938.069 has the authority to take a child into physical custody if the child comes voluntarily, suffers from illness or injury, or faces immediate danger that requires removal from the child’s surroundings. [Wis. Stat.](#) §§ 48.08(2), 938.08(2). Under [Wis. Stat.](#) § 48.981(3)(c), if a mandatory reporter reports suspicions of abuse or neglect to the county department, the department must “initiate a diligent investigation” to determine whether a child or unborn child needs protection and services, and the department has the authority under [Wis. Stat.](#) § 48.08(2) or 48.19(1)(c) to take the child into custody if necessary for the child’s immediate protection. [Wis. Stat.](#) § 48.981(3)(c)1., 2. The department also has the authority under [Wis. Stat.](#) § 48.08(3), 48.19(1)(cm), or 48.193(1)(c) to take an expectant mother into custody if necessary for the unborn child’s immediate protection. [Wis. Stat.](#) § 48.981(3)(c)2m. [Wis. Stat.](#) § 48.981(2) lists the persons who are required to report suspected abuse or neglect.

**Comment.** Although social workers have the authority to take children into custody under [Wis. Stat.](#) § 48.08(2) and must take children into custody under [Wis. Stat.](#) § 48.981, the U.S. Supreme Court has held that failing to do so does not deny due process, even when the failure results in permanent injury to the child. [DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.](#), 489 U.S. 189 (1989). “The *DeShaney* holding has engendered a scholarly response that is impassioned and unequivocally negative.” Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 Mich. L. Rev. 982, 983 (1996); *see, e.g.*, Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1 (1989).

After adjudication of a child as delinquent or in need of protection or services, the agency must submit a court report containing a plan for the child’s rehabilitation, treatment, and care, and recommending a disposition consistent with the plan. [Wis. Stat.](#) §§ 48.069(1)(d), 48.33(1), 938.069(1)(d), 938.33(1). If an unborn child is adjudged in need of protection or services, the agency must submit a court report containing a plan for the expectant mother’s rehabilitation, treatment, and care, and recommending a disposition consistent with the plan. [Wis. Stat.](#) §§ 48.069(1)(d), 48.33(1). Within 60 days after the date on which the child was first removed from the home, the agency must file a permanency plan, except as provided in [Wis. Stat.](#) §§ 48.38(3) and 938.38(3). [Wis. Stat.](#) §§ 48.38(2), (3), 938.38(2), (3); *see also infra* [ch. 11](#) (dispositional hearings).

When acting as part of the disposition staff, the agency must (1) supervise and assist children and their families or the expectant mothers of unborn children subject to informal dispositions, deferred prosecution agreements, consent decrees, and orders of the court, [Wis. Stat.](#) §§ 48.069(1)(a), 938.069(1)(a); (2) offer individual and family counseling, [Wis. Stat.](#) §§ 48.069(1)(b), 938.069(1)(b); (3) seek to obtain services for children and their families and for expectant mothers of unborn children, and investigate and develop resources to that end, [Wis. Stat.](#) §§ 48.069(1)(c), 938.069(1)(c); (4) provide child welfare services, as outlined in [Wis. Stat.](#) § 48.57 and [Wis. Stat.](#) § 938.57; and (5) perform any other functions ordered by the court and consistent with [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, [Wis. Stat.](#) §§ 48.069(1)(e), 938.069(1)(e); *see J.A.*, 138 Wis. 2d at 493 (holding that legislature’s grant of power to judiciary to order reports and investigations relating to CHIPS does not violate separation of powers requirement of Wisconsin Constitution). Under [Wis. Stat.](#) ch. 938, the agency must provide aftercare services to juveniles released from juvenile correctional facilities, or secured residential care centers for children and youth. [Wis. Stat.](#) § 938.069(1)(dj).

When grounds for TPR have been found under [Wis. Stat.](#) § 48.424, the agency must file, pursuant to [Wis. Stat.](#) § 48.425, a court report on the child's history and needs, except that, if the child is an Indian child, the court can order the agency or request the tribal child welfare department of the Indian child's tribe to file that report. [Wis. Stat.](#) § 48.422(8); *see infra* [ch. 17](#) (TPR). In delinquency, CHIPS, UCHIPS, or JIPS cases, defense counsel and the agency are not necessarily adversaries, because the agency's recommendation might prove acceptable to the parent as well as the child. In involuntary TPR cases, however, the agency's interests usually diverge from the parent's: the agency often functions as the petitioner or, at the least, as the county's witness, testifying in favor of TPR. *See Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 28 (1981).

## VIII. Role of Police [§ 3.19]

Law enforcement officers have a major responsibility for diverting or referring juvenile problems. IJA-ABA Joint Comm'n on Juv. Just. Standards, *Standards Relating to Police Handling of Juvenile Problems* § 2.3 commentary at 32 (1980). A law enforcement officer usually takes a child into custody, and the officer makes the initial determination whether to release the child to a parent or other responsible adult or to hold the child and contact the intake worker. [Wis. Stat.](#) §§ 48.19(1), (2), 48.20, 938.19(1), (2), 938.20; *see also infra* [ch. 5](#) (physical custody).

A police officer's decision to release or hold a child can rest on a number of factors, including the following: (1) departmental policy, (2) juvenile court policy, (3) the child's attitude, (4) the parent's attitude, (5) the number and type of prior contacts, (6) the nature of the alleged offense, and (7) the availability of community resources. *See Wis. Stat.* §§ 48.19(1), (2), 48.20, 938.19(1), (2), 938.20. Even if the officer decides to release the child with no further action, this police contact might still be recorded and considered in future juvenile or adult prosecutions. *Stockwell v. State*, 59 Wis. 2d 21, 207 N.W.2d 883 (1973); Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 3.4 (2d ed. 1983).

Taking a child into custody qualifies as an arrest for the purpose of determining whether the law enforcement officer lawfully took the child into custody and obtained evidence. [Wis. Stat.](#) §§ 48.19(3), 938.19(3). Courts recognize that being taken into custody and separated from friends and family is especially intimidating for a child. *Woods v. Clusen*, 605 F. Supp. 890, 895 (E.D. Wis. 1985), *aff'd*, 794 F.2d 293 (7th Cir. 1986). Therefore, the police officer must be scrupulous in advising a child taken into custody of the child's right to remain silent and to have an attorney present during interrogation. *Id.*

A local law enforcement agency must investigate reports of abuse and neglect made under [Wis. Stat.](#) § 48.981. [Wis. Stat.](#) § 48.981(3)(b). The police have the authority to take a child or an expectant mother of an unborn child into custody as provided in [Wis. Stat.](#) §§ 48.19 and 48.193. *See State v. Boggess*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983) (discussing warrantless searches under emergency doctrine when child abuse is suspected). *See chapter 5, infra*, for a discussion of physical custody.

## IX. Role of Court-Appointed Special Advocate (CASA) [§ 3.20]

[Wis. Stat.](#) § 48.236 authorizes CASA programs to provide services in CHIPS cases. Although CASAs are not parties and cannot make motions or call and cross-examine witnesses, CASAs are trained volunteers or employees of a CASA program who can gather information, make observations, and maintain contact with a child subject to a CHIPS proceeding. [Wis. Stat.](#) § 48.236(3). In addition, CASAs may engage in activities specified in a "memorandum of understanding" entered into by the CASA program and the chief judge of the judicial district. [Wis. Stat.](#) §§ 48.236(3)(d), 48.07(5).

## X. Standard Juvenile Court Forms [§ 3.21]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B, infra](#).

### Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938 Wisconsin Records Management Committee

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form                                   | Purpose  |
|-------------------------|---------------------------|--|--|
| <a href="#">GF-131A</a> | Ch. 48                    | Order Appointing Guardian ad Litem or Attorney | Order appointing either a guardian ad litem or an attorney for an individual |

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form           | Purpose  |
|-------------------------|---------------------------|------------------------|--|
| <a href="#">GF-131B</a> | Ch. 48                    | Consent to Act         | Form for attorney to consent to act as guardian ad litem or attorney for an individual |
| <a href="#">JD-1709</a> | Both                      | Juvenile court minutes | Form for recording minutes in juvenile court   |

## Supplement Chapter 4

### Jurisdiction and Venue

Book sections supplemented: [4.1](#), [4.17](#), and [4.25](#)

#### 4.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to the Code of Federal Regulations (C.F.R.) are current through 89 Fed. Reg. 84063 (Oct. 18, 2024).

#### 4.17 [Jurisdiction Under Juvenile Justice and Children’s Codes] [Juveniles Alleged to Be Delinquent] [Exclusive Original Adult Court Jurisdiction] In General

[Page 8: Replaced last paragraph in section](#)

The U.S. Supreme Court has decided a series of cases related to juveniles sentenced as adults: *Miller v. Alabama*, [567 U.S. 460](#) (2012); *Graham v. Florida*, [560 U.S. 48](#) (2010); and *Roper v. Simmons*, [543 U.S. 551](#) (2005). *Miller v. Alabama* held that a sentencing scheme in Alabama, requiring all juveniles convicted of homicide to be sentenced to life imprisonment without parole, violated the Eighth Amendment of the U.S. Constitution. *Miller*, 567 U.S. at 489 (“*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”). After the defendant in *Miller* was resentenced by the Alabama state circuit court to life in prison without parole, the defendant appealed the circuit court’s new sentence. The Court of Criminal Appeals of Alabama affirmed the new sentence of life without parole. *Miller v. Alabama*, [No. CR-20-0654](#), [2023 WL 5315181](#) (Ala. Crim. App. Aug. 18, 2023) (determining that circuit court followed appropriate process in exercising sentencing discretion).

A year before the U.S. Supreme Court decided *Miller*, the Wisconsin Supreme Court held that a life sentence without parole for a defendant who was 14 when the crime was committed did not violate the constitutional prohibition against cruel and unusual punishment. *State v. Ninham*, [2011 WI 33](#), [333 Wis. 2d 335](#), [797 N.W.2d 451](#). The court of appeals reevaluated *Ninham* after *Miller* but concluded that *Miller* did not change *Ninham*’s analysis: in 2016, noting that such a sentence is discretionary, not mandatory, the court of appeals determined that Wisconsin’s sentencing scheme does not run afoul of *Miller*. *State v. Barbeau*, 2016 WI App 51, ¶¶ 24–33, [370 Wis. 2d 736](#), [883 N.W.2d 520](#). The statute ([Wis. Stat. § 973.014\(1g\)\(a\)](#)) allows a court to consider all characteristics of the defendant, including the defendant’s youth, before determining whether to impose life without release. Regardless of the answer to that question, *Miller*, *Graham*, and *Roper* recognize significant scientific research on juvenile development and the juvenile brain that could be useful in original-jurisdiction cases or arguments about juvenile sentencing in criminal cases.

Based on the decision in *Graham*, [560 U.S. 48](#), a group of Wisconsin prisoners serving long sentences for crimes they committed when they were minors challenged Wisconsin’s parole system in a class action. *Heredia v. Blythe*, [638 F. Supp. 3d 984](#) (W.D. Wis. 2022) (noting

that *Graham* ruled that “‘the Eighth Amendment forbids the sentence of life without parole’ for ‘a juvenile offender who did not commit homicide’”) Ultimately, the U.S. District Court for the Western District of Wisconsin held that the Wisconsin Parole Commission can continue to consider the seriousness of the offense and the consequences the offense had on the victims when making a parole decision.

#### 4.25 [Jurisdiction Under Juvenile Justice and Children’s Codes] Children Alleged to Be in Need of Protection or Services

[Page 14: Amended quoted text from Wis. Stat. § 48.13\(2m\).](#)

(2m) The child’s parent has relinquished custody of the child under [\[Wis. Stat. §\] 48.195\(1m\)](#).

## Chapter 4

### Jurisdiction and Venue

#### I. [Scope of Chapter](#)

##### [§ 4.1]

This chapter summarizes which cases a juvenile court has the authority to hear (subject-matter jurisdiction) and where venue lies in particular juvenile cases. This chapter does not address issues of a court’s personal jurisdiction over a child.<sup>1</sup>

**Note.** Failure to act within any time periods under [Wis. Stat.](#) ch. 48 does not affect the court’s competency to act. [Wis. Stat.](#) § 48.315(3).

#### II. Jurisdiction Under Juvenile Justice and Children’s Codes [§ 4.2]

##### A. In General [§ 4.3]

Circuit courts have general subject-matter jurisdiction over all civil and criminal actions and proceedings as prescribed by the state constitution and by statute, except when exclusive subject-matter jurisdiction resides in a particular court. [Wis. Stat.](#) § 753.03. As specifically outlined in various provisions of the Wisconsin Children’s Code ([Wis. Stat.](#) ch. 48) and the Wisconsin Juvenile Justice Code ([Wis. Stat.](#) ch. 938), the juvenile court has exclusive subject-matter jurisdiction over numerous matters involving children. [D.V. v. State \(In re D.V.\)](#), 100 Wis. 2d 363, 366, 302 N.W.2d 64 (Ct. App. 1981).

##### B. Juveniles Alleged to Be Delinquent [§ 4.4]

###### 1. In General [§ 4.5]

Under [Wis. Stat.](#) § 938.12, the juvenile court has exclusive jurisdiction over juveniles 10 years old or older who are alleged to be delinquent. Delinquents are juveniles at least 10 years old but less than 17 years old who have violated any state or federal criminal law or who have committed contempt of court. [Wis. Stat.](#) § 938.02(3m). Delinquents do not include juveniles waived into adult court under [Wis. Stat.](#) § 938.18. Also, delinquents do not include juveniles who have committed traffic, boating, snowmobile, all-terrain vehicle, utility terrain vehicle, or limited-use off-highway motorcycle violations or civil law or ordinance violations under [Wis. Stat.](#) § 938.17 or juveniles alleged to have committed an offense over which the adult court has original jurisdiction under [Wis. Stat.](#) § 938.183. *Id.*

Because only juveniles between the ages of 10 and 17 years old fall under the jurisdictional requirement of [Wis. Stat.](#) § 938.12, interesting jurisdictional questions have arisen based on the age of the juvenile at the time of the offense.

###### 2. Offense Committed When Juvenile Under 10 but Charged When Juvenile Older Than 10 [§ 4.6]

Jurisdiction in a delinquency case depends on the age of the juvenile when the petition is filed, not on the juvenile’s age when he or she allegedly committed the crime. For instance, in [D.V. v. State \(In re D.V.\)](#), 100 Wis. 2d 363, 302 N.W.2d 64 (Ct. App. 1981), although the juvenile had not yet turned 12 years old (the then-applicable statutory jurisdictional age) when he allegedly committed the delinquent act,



because he had reached age 12 by the time formal proceedings commenced, the court had jurisdiction under the delinquency statute (then [Wis. Stat.](#) § 48.12) rather than under the children in need of protection or services (CHIPS) statute (then [Wis. Stat.](#) § 48.13(12)). Although the court decided *D.V.* before 1995 Wis. Act 77 changed the age of jurisdiction for alleged delinquent children from 12 to 10 and renumbered [Wis. Stat.](#) §§ 48.12 and 48.13(12), the holding applies to the current statutes ([Wis. Stat.](#) §§ 938.12 and 938.13(12)) as well. Because [Wis. Stat.](#) § 938.13 uses the same terminology (“alleged to be in need of protection or services”), jurisdiction for juveniles in need of protection or services (JIPS) proceedings based on a delinquent act attaches only when the juvenile has not reached 10 years of age when the petition is filed. See *D.V.*, 100 Wis. 2d at 366.

### 3. Offense Committed When Juvenile Older Than 10 but Charged in Adult Court After Individual Has Turned 17 [§ 4.7]

#### a. In General [§ 4.8]

Under certain circumstances, an individual, without being waived into adult court, can be charged when an adult for offenses committed when the individual was a juvenile. See [Wis. Stat.](#) § 938.18; see also *infra* § 4.15. As discussed in the following sections, these circumstances arise either in connection with (1) offenses of which the state is aware while the individual is still a juvenile, or (2) offenses of which the state becomes aware only after the individual has become an adult.

#### b. State Aware of Offense While Individual Is a Juvenile but Delays Charging Until Individual Is an Adult [§ 4.9]

The state may wait to initiate proceedings until after a juvenile reaches adulthood, with resultant adult court jurisdiction, only if the state can demonstrate that it lacked the intent to manipulate jurisdiction. In *Miller v. Quatsoe*, 348 F. Supp. 764 (E.D. Wis. 1972), the U.S. District Court for the Eastern District of Wisconsin held that the state cannot delay initiating proceedings against a juvenile to avoid juvenile court jurisdiction. *Id.* at 766. In *Miller*, although Miller had committed an offense while in the custody of the jail three weeks before he became an adult, the record showed that the state sought to avoid juvenile court jurisdiction by intentionally waiting to charge Miller until he became an adult.

The Wisconsin Supreme Court addressed the *Miller* issue in *State v. Becker*, 74 Wis. 2d 675, 247 N.W.2d 495 (1976), holding that when the state has reason to believe that a juvenile has committed a crime, an adult criminal court cannot exercise jurisdiction over a charge filed after the juvenile becomes an adult unless the state demonstrates that it did not delay filing the charge for the purpose of avoiding juvenile court jurisdiction. *Id.* at 678. The supreme court suggested that to resolve this jurisdictional issue, defense counsel should file *in the adult court* a motion to dismiss for lack of subject-matter jurisdiction, and the court should hold a due-process hearing on defense counsel’s motion. *Id.* at 680. The jurisdictional issue should not be remanded to the juvenile court. *Id.*

A motion to dismiss based on a claim that the state intentionally delayed charging the juvenile in order to avoid juvenile court jurisdiction is not automatically entitled to an evidentiary hearing. The Wisconsin Supreme Court has set out a two-part test to determine whether the defendant should receive an evidentiary hearing in such cases. First, the defendant must allege facts that would entitle the defendant to relief. Second, the motion and reasonable facts drawn from it must create a reasonable probability that an evidentiary hearing will establish a factual basis on which the defendant’s motion might prevail. *State v. Velez*, 224 Wis. 2d 1, 17–18, 589 N.W.2d 9 (1999).

If the state fails to meet its burden of proof, the court must dismiss the case with prejudice: the Juvenile Justice Code does not authorize filing a delinquency petition against an individual 17 years old or older, because, by definition, the individual does not qualify as a delinquent juvenile. [Wis. Stat.](#) § 938.02(3m), (10m). [Wis. Stat.](#) § 938.12(2) applies only to juveniles properly charged in juvenile court who become adults during the pendency of the proceedings. But see *Bendler v. Percy*, 481 F. Supp. 813, 814 (E.D. Wis. 1979).

One year after the *Becker* decision, in *State v. Avery*, 80 Wis. 2d 305, 259 N.W.2d 63 (1977), the supreme court appeared to expand the *Becker* test to include prosecutorial negligence as well as intentional delay in bringing charges. See *D.V. v. State (In re D.V.)*, 100 Wis. 2d 363, 368, 302 N.W.2d 64 (Ct. App. 1981). In *State v. Montgomery*, 148 Wis. 2d 593, 436 N.W.2d 303 (1989), *rev’g* 142 Wis. 2d 707, 419 N.W.2d 316 (Ct. App. 1988), however, the court withdrew that language. In *Montgomery*, the court held that dismissal of a complaint under *Miller/Becker/Avery* can occur only if the state fails to demonstrate that it did not have manipulative intent. *Id.* at 603. This delay need not be caused only by the state, but can also result from actions by the intake worker at the direction of the state. *State v. Bergwin*, 2010 WI App 137, 329 Wis. 2d 737, 793 N.W.2d 72.

The most common reason justifying delay in charging is the existence of an ongoing police investigation, especially in undercover drug cases in which the state can show that charging the individual sooner would have jeopardized the success of the investigation and the safety

of the officer. *Bendler*, 481 F. Supp. at 815 (13-month delay). *Becker* and *Avery* involved ongoing drug investigations. *Montgomery* was a sexual-assault case.

**Comment.** Because the state bears the burden of proving a valid reason for the delay in charging, mere assertions by the district attorney do not suffice. For example, in *Bendler* and in *Becker*, before finding sufficient reasons for the delay, the trial court heard detailed facts about the ongoing investigation by officers in charge. *Bendler*, 481 F. Supp. at 815; *Becker*, 74 Wis. 2d at 679.

### c. State Does Not Discover Offenses Committed by Juvenile Until After Individual Turns 17 [§ 4.10]

Due process does not protect a defendant from loss of juvenile court jurisdiction caused by mere passage of time. Therefore, if a defendant allegedly committed a crime while too young to face waiver into adult court but the crime was not reported or charged until the defendant was an adult, prosecution can take place in criminal court unless the state had manipulative intent to delay charging. *State v. Annala*, 168 Wis. 2d 453, 484 N.W.2d 138 (1992); *State v. LeQue*, 150 Wis. 2d 256, 442 N.W.2d 494 (Ct. App. 1989).

In *State v. LeQue* and *State v. Annala*, the defendants committed sexual assaults while too young to face waiver into adult court. *LeQue*'s crime was reported to the police 20 days before his 18th birthday and *Annala*'s when he was 20 years old. In *LeQue*, the court of appeals held that even though the defendant could not have been waived into adult criminal court if proceedings had commenced sooner following commission of the offense, that fact did not distinguish the case from the *Becker/Avery* line of cases. *LeQue*, 150 Wis. 2d at 262. In *Annala*, the supreme court approved *LeQue* and held that, absent manipulative intent by the state, the defendant's age when a charge is filed determines which court has jurisdiction, regardless of the defendant's age at the time of the offense. *Annala*, 168 Wis. 2d at 471.

## 4. Offense Committed and Delinquency Petition Filed When Individual Is a Juvenile but Individual Reaches Age 17 While Proceedings Pending [§ 4.11]

### a. In General [§ 4.12]

If a juvenile reaches age 17 during a delinquency proceeding, jurisdiction remains with the juvenile court. The juvenile court can also, under certain circumstances, retain jurisdiction of juveniles who reach age 17 after disposition.

### b. Juvenile Turns 17 Before Adjudication [§ 4.13]

[Wis. Stat.](#) § 938.12(2) provides that if a juvenile turns 17 years old after a delinquency petition is filed but before adjudication, jurisdiction remains with the juvenile court. Therefore, whether the juvenile has appeared in court on the charges does not matter. Jurisdiction depends only on the date the juvenile petition was filed. *D.W.B. v. State (In the Int. of D.W.B.)*, 158 Wis. 2d 398, 405, 462 N.W.2d 520 (1990) (holding, in context when adult court age was 18, that filing of delinquency petition commences juvenile court action and that juvenile court retains jurisdiction even if defendant does not appear in juvenile court before reaching age 18).

### c. Juvenile Turns 17 After Adjudication [§ 4.14]

If the juvenile turns 17 years old after adjudication, jurisdiction remains with the juvenile court.

The juvenile court can retain jurisdiction over juveniles who reach the age of 17 after disposition. [Wis. Stat.](#) § 938.355(4). For example, jurisdiction over a juvenile placed in a juvenile correctional facility can be extended beyond the juvenile's 17th birthday, provided that the juvenile was not 17 years or older when the original dispositional order terminated. [Wis. Stat.](#) § 938.355(4)(b); *see also infra* [ch. 11](#) (dispositional hearings). The original dispositional order itself can apply for up to two years or until the juvenile's 18th birthday, whichever is earlier, for a juvenile committed to a juvenile correctional facility, a secured residential care center for children and youth, or a Type 2 residential care center for children and youth. [Wis. Stat.](#) § 938.355(4)(b). If an order placing a juvenile in a juvenile correctional facility, a secured residential care center for children and youth, or a Type 2 residential care center for children and youth does not specify a termination date, the order applies for one year or until the juvenile's 18th birthday, whichever is earlier, unless the court terminates the order sooner. [Wis. Stat.](#) § 938.355(4)(b). Finally, if the court orders a juvenile to participate in the serious juvenile offender program pursuant to [Wis. Stat.](#) § 938.34(4h), the judge must make the dispositional order applicable for five years if the juvenile is adjudicated delinquent for committing a Class E felony burglary in violation of [Wis. Stat.](#) § 943.10(2) or a Class B or C felony, or applicable until the juvenile reaches age 25 if the juvenile is adjudicated delinquent for committing a Class A felony. [Wis. Stat.](#) § 938.355(4)(b).

## 5. Waiver of Juvenile Court Jurisdiction [§ 4.15]

The state can seek to have the juvenile court waive its jurisdiction over any juvenile alleged to have violated any state criminal law on or after his or her 15th birthday. [Wis. Stat. § 938.18\(1\)\(c\)](#). In addition, the court can waive juvenile court jurisdiction over a juvenile alleged to have committed certain crimes on or after his or her 14th birthday. Specifically, the court can waive jurisdiction over a juvenile who is 14 years old or older and who allegedly violated one of the following criminal statutes: (1) [Wis. Stat. § 961.41\(1\)](#) (manufacture, distribution, or delivery of a controlled substance or controlled substance analog); (2) [Wis. Stat. § 940.03](#) (felony murder); (3) [Wis. Stat. § 940.06](#) (second-degree reckless homicide); (4) [Wis. Stat. § 940.225\(1\)](#) or (2) (first- or second-degree sexual assault); (5) [Wis. Stat. § 940.305](#) (taking hostages); (6) [Wis. Stat. § 940.31](#) (kidnapping); (7) [Wis. Stat. § 943.10\(2\)](#) (various forms of aggravated burglary, including armed burglary); (8) [Wis. Stat. § 943.32\(2\)](#) (armed robbery); or (9) [Wis. Stat. § 943.87](#) (robbery of a financial institution). [Wis. Stat. § 938.18\(1\)\(a\)](#). Also, the juvenile court can waive its jurisdiction over a juvenile who is 14 years old or older if he or she allegedly commits a felony at the request of, or for the benefit of, a criminal gang. [Wis. Stat. § 938.18\(1\)\(b\)](#).

**Note.** A 14-year-old juvenile subject to a delinquency petition who absconds and does not return until he or she is 17 may be waived into adult court, even though the juvenile was not eligible for waiver when originally petitioned. [State v. Pablo R. \(In the Int. of Pablo R.\)](#), 2000 WI App 242, 239 Wis. 2d 479, 620 N.W.2d 423.

The waiver hearing is not part of the delinquency proceeding. If a waiver petition has been filed, delinquency proceedings do not commence until after the waiver hearing has been held and jurisdiction retained in juvenile court. [State v. Kastner](#), 156 Wis. 2d 371, 374, 457 N.W.2d 351 (Ct. App. 1990).

Before waiving jurisdiction, the court must follow the procedures of [Wis. Stat. § 938.18](#) and must base its decision on the criteria in [Wis. Stat. § 938.18\(5\)](#). If the court grants waiver pursuant to [Wis. Stat. § 938.18\(6\)](#), the case transfers to adult criminal court.

**Note.** While the term *jurisdiction* is commonly used to distinguish between juvenile and adult court authority, the court of appeals held in [State v. Schroeder](#), 224 Wis. 2d 706, 593 N.W.2d 76 (Ct. App. 1999), that this term is not correctly used in this context. Instead, the issue is one of the court's statutory *authority or competence*. *Id.* at 717–19. Thus, a juvenile can waive any challenge to the court's competence by entering a guilty plea in adult court. See [State v. Kraemer](#), 156 Wis. 2d 761, 457 N.W.2d 562 (Ct. App. 1990).

Because the court waives juvenile court jurisdiction over a particular case only, a juvenile could find himself or herself under the jurisdiction of the juvenile court for one case and under the jurisdiction of the adult court for another. The juvenile has a right to a waiver hearing for each offense. [Gibson v. State](#), 47 Wis. 2d 810, 177 N.W.2d 912 (1970). This right, however, does not limit the district attorney's authority to determine what specific charge to file in adult criminal court. [Wis. Stat. § 938.18\(9\)](#). But see sections [4.16–4.19](#), *infra*, regarding original adult court jurisdiction.

See [chapter 14](#), *infra*, for more details on waiver into adult court.

## 6. Exclusive Original Adult Court Jurisdiction [§ 4.16]

### a. [In General](#)

#### [§ 4.17]

The Juvenile Justice Code allows for exclusive original adult court jurisdiction for numerous offenses. [Wis. Stat. § 938.183](#). For instance, adult criminal courts have exclusive original jurisdiction over a juvenile who has been previously adjudicated delinquent and has allegedly violated [Wis. Stat. § 940.20\(1\)](#) (battery by prisoner) or [Wis. Stat. § 946.43](#) (assault by prisoner) while placed in a juvenile correctional facility, juvenile detention facility, or secured residential care center for children and youth. [Wis. Stat. § 938.183\(1\)\(a\)](#). If a juvenile previously adjudicated delinquent allegedly violates [Wis. Stat. § 940.20\(2m\)](#) (battery to a probation, extended supervision, parole, or community supervision agent (or aftercare agent)), the adult criminal court also has exclusive original jurisdiction over the juvenile. [Wis. Stat. § 938.183\(1\)\(a\)](#).

Further, the adult criminal court has original jurisdiction over juveniles who allegedly violate or attempt to violate [Wis. Stat. § 940.01](#) (first-degree intentional homicide) or who allegedly violate [Wis. Stat. § 940.05](#) (second-degree intentional homicide) or [Wis. Stat. § 940.02](#) (first-degree reckless homicide). [Wis. Stat. § 938.183\(1\)\(am\)](#).

Next, the adult criminal court has original jurisdiction over a juvenile specified in [Wis. Stat. § 938.183\(1\)\(a\)](#) or (am) who allegedly attempts to commit or commits a violation of any other state criminal law, if the two violations can be joined under [Wis. Stat. § 971.12\(1\)](#). [Wis. Stat. § 938.183\(1\)\(ar\)](#). [Wis. Stat. § 971.12\(1\)](#) allows for two or more crimes to be charged in the same complaint or information if the

crimes are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Finally, if a juvenile allegedly commits a crime after a previous waiver into adult court for a prior offense or after committing a prior offense over which the adult court had original jurisdiction, the adult court will have exclusive original jurisdiction over the juvenile if he or she was convicted of the prior offense or if the prior offense is still pending in the adult court. [Wis. Stat. § 938.183\(1\)\(b\), \(c\)](#).

Juveniles under 15 years old who are subject to original adult court jurisdiction can be held in secure custody only in a juvenile detention facility or juvenile portion of the county jail. [Wis. Stat. § 938.183\(1m\)\(a\)](#).

The Juvenile Justice Code requires the adult court to impose a juvenile disposition if the juvenile is ultimately found to have committed a lesser offense or the joined offense under [Wis. Stat. § 971.12\(1\)](#) (but not the offense to which the joined offense is joined). [Wis. Stat. § 938.183\(1m\)\(c\)](#). Before the adult court imposes a juvenile disposition in such a case, however, the conditions specified in [Wis. Stat. § 938.183\(1m\)\(c\)1., 2., or 3.](#) must be met. *See infra* [§ 4.19](#).

**Note.** [Wis. Stat. § 48.183](#), the precursor to [Wis. Stat. § 938.183](#), allowed for original adult court jurisdiction in a limited number of instances. The court of appeals ruled that the former [Wis. Stat. § 48.183](#) did not deprive a person of either due process or equal protection. *See State v. Hazen*, 198 Wis. 2d 554, 543 N.W.2d 503 (Ct. App. 1995); *State v. Verhagen*, 198 Wis. 2d 177, 542 N.W.2d 189 (Ct. App. 1995).

The U.S. Supreme Court has decided a series of cases related to juveniles sentenced as adults. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). *Miller v. Alabama* held that juveniles cannot be sentenced to mandatory life imprisonment without parole. Before *Miller* was decided, the Wisconsin Supreme Court held that a life sentence without parole for a defendant who was 14 when the crime was committed did not violate the constitutional prohibition against cruel and unusual punishment. *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. The court of appeals reevaluated *Ninham* after *Miller* but concluded that *Miller* did not change *Ninham*'s analysis. Noting that such a sentence is discretionary, not mandatory, the court of appeals determined that Wisconsin's sentencing scheme does not run afoul of *Miller*. *State v. Barbeau*, 2016 WI App 51, ¶¶ 24–33, [370 Wis. 2d 736](#), 883 N.W.2d 520. The statute allows a court to take into consideration all characteristics of the defendant, including youth, before determining whether to impose life without release. Regardless of the answer to that question, *Miller*, *Graham*, and *Roper* recognize significant scientific research on juvenile development and the juvenile brain that could be useful in original-jurisdiction cases or arguments about juvenile sentencing in criminal cases.

## **b. Transfer from Adult Court to Juvenile Court (Reverse Waiver) [§ 4.18]**

The Juvenile Justice Code also allows the adult court to transfer the case to the juvenile court when all of the circumstances outlined in [Wis. Stat. § 938.183\(1m\)\(b\)](#) exist. This transfer from adult court to juvenile court is sometimes referred to as a *reverse waiver*. These circumstances are as follows: (1) if convicted, the juvenile could not receive adequate treatment in the criminal justice system, *see* [Wis. Stat. §§ 970.032\(2\)\(a\), 971.31\(13\)\(a\)1.](#); (2) transferring jurisdiction to the juvenile court would not depreciate the seriousness of the offense, *see* [Wis. Stat. §§ 970.032\(2\)\(b\), 971.31\(13\)\(a\)2.](#); and (3) retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the same offense, *see* [Wis. Stat. §§ 970.032\(2\)\(c\), 971.31\(13\)\(a\)3.](#) With respect to the first circumstance, the court of appeals has held that the circuit court need not find that there is a total absence of treatment available in the adult system. *State v. Dominic E.W.*, 218 Wis. 2d 52, 579 N.W.2d 282 (Ct. App. 1998). Rather, the court should balance the treatment available in the juvenile system with the treatment available in the adult system. *Id.* at 56.

In misdemeanor cases, the adult court considers whether to transfer its jurisdiction only if the juvenile files a motion alleging either that the juvenile did not commit the alleged violation under the circumstances described in [Wis. Stat. § 938.183\(1\)\(b\)](#) or (c), or that the above three circumstances for transfer are met. *See* [Wis. Stat. § 971.31\(13\)\(a\)](#). In felony cases, the adult court *must* determine whether to retain jurisdiction or transfer its jurisdiction to the juvenile court. *See* [Wis. Stat. § 970.032\(2\)](#). The court determines whether to retain jurisdiction or transfer jurisdiction only after the court finds probable cause to believe that a felony was committed by the juvenile (under the circumstances specified in [Wis. Stat. § 938.183\(1\)](#)). *See id.* The reverse-waiver procedures apply to juveniles age 15 years or older who have allegedly attempted or committed a violation of [Wis. Stat. § 940.01](#) or who have allegedly committed a violation of [Wis. Stat. § 940.02](#) or [Wis. Stat. § 940.05](#). *See* [Wis. Stat. §§ 938.183\(1\)\(am\), \(1m\)\(c\)3., 970.032\(2\)](#).

In both misdemeanor and felony cases, the juvenile must prove by a preponderance of the evidence that the adult court should transfer the case to juvenile court. [Wis. Stat. §§ 970.032\(2\), 971.31\(13\)\(b\)](#). If the juvenile does not meet this burden, then the adult court must retain jurisdiction. [Wis. Stat. §§ 970.032\(2\), 971.31\(13\)\(b\)](#). A trial court's decision to retain or transfer jurisdiction in a reverse-waiver situation is discretionary. *Dominic E.W.*, 218 Wis. 2d at 56.



In an original-jurisdiction case, the reverse-waiver process under [Wis. Stat. § 970.032](#) consists of two parts: the preliminary examination, [Wis. Stat. § 970.032\(1\)](#), and the reverse-waiver-hearing phase, [Wis. Stat. § 970.032\(2\)](#). The preliminary examination is the only part of the reverse-waiver process at which a juvenile can challenge the sufficiency of the evidence to prove that probable cause exists that the juvenile committed the charged original-jurisdiction offense. At the preliminary examination, a juvenile must offer any mitigating evidence to contradict that the state has established that the juvenile has committed one of the specific offenses outlined in [Wis. Stat. § 938.183\(1\)](#). *State v. Toliver*, 2014 WI 85, 356 Wis. 2d 642, 851 N.W.2d 251. “Although specificity is strongly preferred, a general probable cause determination might comply with [Wis. Stat. § 970.032\(1\)](#) if the totality of the circumstances demonstrates ... the court’s finding related to the charged offense under [Wis. Stat. § 938.183\(1\)](#).” *Id.* ¶ 36. If the juvenile does not use that opportunity to present evidence challenging the sufficiency of the evidence to establish the charged original-jurisdiction offense, he or she cannot do so during the reverse-waiver-hearing phase. *State v. Kleser*, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144.

### c. Dispositions and Sentences [§ 4.19]

For juveniles in adult criminal court under [Wis. Stat. § 938.183\(1\)](#), the adult court must impose a juvenile disposition if the juvenile is found to have committed a lesser offense or the joined offense but not the offense to which the joined offense is joined, and one of the following applies: (1) the lesser offense or the joined offense is not battery or assault by a prisoner, battery to a probation, extended supervision, parole, or community supervision (or aftercare) agent, attempted first-degree intentional homicide, first-degree reckless homicide, second-degree intentional homicide, or an offense for which the juvenile can be waived under [Wis. Stat. § 938.18](#); or (2) the lesser offense or the joined offense is battery or assault by a prisoner, battery to a probation, extended supervision, parole, or community supervision (or aftercare) agent, attempted first-degree intentional homicide, first-degree reckless homicide, second-degree intentional homicide, or an offense for which the juvenile can be waived under [Wis. Stat. § 938.18](#), and the court, after considering the waiver criteria under [Wis. Stat. § 938.18\(5\)](#), finds that the juvenile has proved by clear and convincing evidence that it would be in the best interests of the juvenile and the public to impose a juvenile disposition. [Wis. Stat. § 938.183\(1m\)\(c\)1., 2.](#)

For juveniles age 15 or older, if the court finds that the juvenile has not attempted to commit a violation of [Wis. Stat. § 940.01](#) and has not committed a violation of [Wis. Stat. § 940.01](#), [Wis. Stat. § 940.02](#), or [Wis. Stat. § 940.05](#), the court must impose a juvenile disposition if, after considering the waiver criteria under [Wis. Stat. § 938.18\(5\)](#), the court determines that the juvenile has proved by clear and convincing evidence that it would be in the best interests of the juvenile and of the public to adjudge the juvenile delinquent and impose a juvenile disposition. [Wis. Stat. § 938.183\(1m\)\(c\)3.](#)

Whenever the adult criminal court imposes a juvenile disposition, the juvenile is not convicted of a crime. Rather, the juvenile is adjudged delinquent. [Wis. Stat. § 938.183\(1m\)\(c\).](#)

Juveniles under age 18 who are subject to adult prison sentences will serve their time in a juvenile correctional facility. At age 17, they may be transferred into an adult prison, but they cannot be transferred to the maximum security correctional institution in Boscobel. [Wis. Stat. § 938.183\(3\)](#); see [Wis. Stat. § 301.16\(1n\)](#). Most juveniles, however, are not transferred into an adult prison until they are age 18 because of the guidelines in the Prison Rape Elimination Act (PREA) of 2003. Pub. L. No. 108-79, 117 Stat. 972 (codified at 34 [U.S.C. §§ 30301–30309](#)).

## 7. Statutes of Limitation [§ 4.20]

The statutes of limitation for criminal prosecutions apply to delinquency cases. [Wis. Stat. § 938.25\(4\)](#) (“[[Wis. Stat. § 939.74](#) applies to delinquency petitions filed under this chapter.”). Felony prosecutions generally must commence within 6 years after the commission of the offense, and misdemeanor prosecutions within 3 years. [Wis. Stat. § 939.74\(1\)](#). Prosecutions for second-degree reckless homicide can commence within 15 years after the offense. [Wis. Stat. § 939.74\(2\)\(am\)](#). Prosecutions for second- and third-degree sexual assault under [Wis. Stat. § 940.225\(2\)](#) or (3) can commence within 10 years after the offense. [Wis. Stat. § 939.74\(2\)\(ar\)](#). Prosecutions for the following offenses may commence at any time: first-degree sexual assault of a child, repeated acts of sexual assault against a child, first-degree sexual assault, first- or second-degree intentional homicide, first-degree reckless homicide, and felony murder. [Wis. Stat. § 939.74\(2\)\(a\)1.](#) Prosecutions for an attempt to commit the following offenses also may be prosecuted at any time: first- or second-degree intentional homicide, first-degree sexual assault, and first-degree sexual assault of a child. [Wis. Stat. § 939.74\(2\)\(a\)2.](#) Except as provided in [Wis. Stat. § 939.74\(2d\)](#), prosecutions for some sex crimes against children can commence up until the victim reaches 45 years of age, [Wis. Stat. § 939.74\(2\)\(c\)](#); and prosecutions for abuse cases against children may commence until the victim reaches 26 years of age, [Wis. Stat. § 939.74\(2\)\(cm\)](#). When a DNA sample comparison results in a probable identification, the prosecution of certain offenses can commence 12 months after that comparison. [Wis. Stat. § 939.74\(2d\).](#)

In addition, a prosecution for theft of property obtained legally but subsequently misappropriated can commence within one year after the discovery of the loss by the victim but cannot commence more than five years beyond the general six-year or three-year limitation period. [Wis. Stat.](#) § 939.74(2)(b). Prosecution for racketeering charges may commence within six years after a violation under the Wisconsin Organized Crime Control Act terminates. [Wis. Stat.](#) § 946.88(1).

In computing time for the statute of limitation, [Wis. Stat.](#) § 939.74(3) and (4) exclude certain periods.

## 8. Jurisdiction over Certain Indian Juveniles [§ 4.21]

### a. Wisconsin Indian Child Welfare Act (WICWA) and Federal Indian Child Welfare Act (ICWA) [§ 4.22]

The Wisconsin Indian Child Welfare Act (WICWA), *see* 2009 Wis. Act 94, codified the federal Indian Child Welfare Act (ICWA), 25 [U.S.C.](#) §§ 1901–1963, and set forth the state policy of Wisconsin for custody proceedings involving an Indian child or juvenile. [Wis. Stat.](#) §§ 48.01(2), 938.01(3). *See generally* [Wis. Stat.](#) §§ 48.028, 938.028. This section will address WICWA only as it applies to [Wis. Stat.](#) ch. 938. Related provisions apply under [Wis. Stat.](#) ch. 48 in cases involving the out-of-home placement of an Indian child. *See also generally* 25 [C.F.R.](#) pt. 23 (federal ICWA regulations); Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 30, 2016) (notice of availability), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-30/pdf/2016-31726.pdf>.

WICWA applies to juvenile custody hearings in certain JIPS proceedings—specifically, those stemming from allegations of uncontrollability ([Wis. Stat.](#) § 938.13(4)); habitual truancy ([Wis. Stat.](#) § 938.13(6)); school dropouts ([Wis. Stat.](#) § 938.13(6m)); and habitual runaways ([Wis. Stat.](#) § 938.13(7)). *See* [Wis. Stat.](#) § 938.028(2)(b). WICWA does not apply to delinquency cases because ICWA does not apply to placements based on an act that, if committed by an adult, would be deemed a crime. 25 [U.S.C.](#) § 1903(1). Section [4.23](#), *infra*, discusses jurisdictional issues involving Indian juveniles who allegedly commit delinquent acts.

WICWA requires that the courts and agencies cooperate fully with Indian tribes to ensure federal ICWA enforcement, protect the best interests of Indian juveniles, and promote the stability and security of Indian tribes and families. [Wis. Stat.](#) § 938.01(3). WICWA achieves these requirements through the establishment of minimum standards for the removal of Indian juveniles from their families and through placement of those juveniles in out-of-home care that will reflect the unique value of Indian culture. [Wis. Stat.](#) § 938.01(3)(b)1. Also, WICWA achieves these requirements by trying to prevent out-of-home care placements or, if one is necessary, by requiring that placement to reflect the unique values of the Indian juvenile’s tribal culture and to be the best able to assist the juvenile in establishing, developing, and maintaining a political, cultural, and social relationship with the juvenile’s tribal community. [Wis. Stat.](#) § 938.01(3)(b)2.

WICWA and ICWA apply to any Indian juvenile custody proceeding regardless of whether the Indian juvenile is in the legal custody or physical custody of an Indian parent, Indian custodian, extended family member, or other person at the commencement of the proceeding and regardless of whether the Indian juvenile resides on or off a reservation. [Wis. Stat.](#) § 938.028(3)(a). A court cannot determine whether ICWA applies “to an Indian juvenile custody proceeding based on whether the Indian juvenile is part of an existing Indian family.” *Id.*

The parent of an Indian juvenile (regardless of whether the parent is an Indian) and an Indian custodian have the right to appointed counsel; the court may appoint counsel for the Indian juvenile if doing so is deemed to be in the juvenile’s best interests. [Wis. Stat.](#) §§ 938.028(4)(b), 938.23(1m), (2g), (3). Counsel in these instances is appointed by the Wisconsin State Public Defender. [Wis. Stat.](#) § 977.08(1).

The tribal court has exclusive jurisdiction over an Indian juvenile custody proceeding if the Indian juvenile is a ward of the tribal court or if the Indian juvenile resides or is domiciled within the reservation of the tribe, except when that jurisdiction is otherwise vested in the state by federal law. [Wis. Stat.](#) § 938.028(3)(b)1. An Indian juvenile who is temporarily off the reservation may be taken into protective custody pursuant to [Wis. Stat.](#) §§ 938.19–21. [Wis. Stat.](#) § 938.028(3)(b)2. *See generally infra* [ch. 5](#) (custody). In any Indian juvenile custody proceeding under [Wis. Stat.](#) ch. 938 involving an out-of-home placement of an Indian juvenile who is not residing or domiciled within the reservation of the Indian juvenile’s tribe, the court assigned to exercise jurisdiction under [Wis. Stat.](#) ch. 938 must, upon the petition of the Indian juvenile’s parent, Indian custodian, or tribe, transfer the proceeding to the jurisdiction of the tribe unless any of the following applies:

1. A parent of the Indian juvenile objects to the transfer. [Wis. Stat.](#) § 938.028(3)(c)1.
2. The Indian juvenile’s tribe does not have a tribal court, or the tribal court of the Indian juvenile’s tribe declines jurisdiction. [Wis. Stat.](#) § 938.028(3)(c)2.

3. The court determines that good cause exists to deny the transfer. [Wis. Stat. § 938.028\(3\)\(c\)](#)3. The court cannot consider perceived inadequacy of the tribal social services department or the tribal court of the Indian juvenile's tribe. The court may find good cause only if the person opposing the transfer shows by clear and convincing evidence that any of the following applies:
  - a. The Indian juvenile is 12 years old or older and objects to the transfer.
  - b. The evidence or testimony necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by arranging to receive the evidence or testimony by use of telephone or live audiovisual means, by hearing the evidence or testimony at a location that is convenient to the parties and witnesses, or by use of other means permissible under the tribal court's rules of evidence.
  - c. The Indian juvenile's tribe received notice of the proceeding, the tribe has not indicated to the court in writing that the tribe is monitoring the proceeding and may request a transfer at a later date, and the tribe files the petition for transfer and does so more than six months after the tribe received notice of the proceeding.

If the court assigned to exercise jurisdiction under [Wis. Stat. ch. 938](#) determines that the petitioner in an Indian juvenile custody proceeding has improperly removed the Indian juvenile from the custody of his or her parent or Indian custodian or has improperly retained custody of the Indian juvenile after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition and immediately return the Indian juvenile to the custody of the parent or Indian custodian, unless the court determines that returning the Indian juvenile to his or her parent or Indian custodian would subject the Indian juvenile to substantial and immediate danger or the threat of that danger. [Wis. Stat. § 938.028\(3\)\(d\)](#).

If at any point in a proceeding the court determines or has reason to know that the juvenile is an Indian juvenile, the court must provide notice of the proceeding to the juvenile's parent, Indian custodian, and tribe in the manner specified in [Wis. Stat. § 938.028\(4\)\(a\)](#). The next hearing in the proceeding cannot be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe or, if the identity or location of the parent, Indian custodian, or tribe cannot be determined, until at least 15 days after receipt of the notice by the U.S. Secretary of the Interior. On request of the parent, Indian custodian, or tribe, the court must grant a continuance of up to 20 additional days to enable the requester to prepare for that hearing. [Wis. Stat. § 938.299\(10\)](#).

If an Indian juvenile is found to be in need of protection or services under [Wis. Stat. § 938.13\(4\), \(6\), \(6m\), or \(7\)](#), any parent or Indian custodian from whose custody that Indian juvenile was removed or the Indian juvenile's tribe may move the court to invalidate an out-of-home placement order on the ground that the placement order violates ICWA. If that order violates ICWA, the court must invalidate the placement order. [Wis. Stat. § 938.028\(5\)](#).

## **b. Delinquency [§ 4.23]**

If an Indian juvenile allegedly commits a delinquent act and, at the time of the alleged violation, was both under a tribal court order (not related to adoption, physical placement, or visitation with the juvenile's parent, or permanent guardianship, *see* [Wis. Stat. §§ 938.185\(4\), 938.24\(2r\)\(a\)1., 938.255\(1\)\(cr\)1.b.](#)) and physically outside the boundaries of that tribe's reservation, certain procedures must be followed by the intake worker, prosecutor, and juvenile court. *See, e.g.,* [Wis. Stat. §§ 938.24\(2r\)\(a\), 938.25\(2g\), 938.255\(1\)\(cr\), \(2\), 938.299\(9\)](#). The Wisconsin Legislature put these procedures in place by enacting 2003 Wis. Act 284 in response to the court of appeals' decision in [State v. Elmer J.K. \(In the Interest of Elmer J.K.\)](#), 224 Wis. 2d 372, 591 N.W.2d 176 (Ct. App. 1999) (relying on pre-Juvenile Justice Code case law in holding that tribal court did not have jurisdiction over Indian juvenile).

First, if during the intake inquiry the intake worker determines that the above circumstances exist, the intake worker must notify the clerk of the tribal court, a tribal juvenile intake worker, or a tribal prosecutor that the juvenile has allegedly committed a delinquent act. [Wis. Stat. § 938.24\(2r\)\(a\)](#). If the tribal officials advise the intake worker that a petition has been or may be filed in tribal court, the intake worker must consult with tribal officials unless the worker closes the case. [Wis. Stat. § 938.24\(2r\)\(b\)](#). ([Wis. Stat. § 938.24\(4\)](#) allows the intake worker, as a result of the intake inquiry, to close the case.) After consultation with the tribal officials, the intake worker must determine whether the best interests of the juvenile and of the public would be served by having the matter proceed solely in tribal court. If so, the case must be closed. If not, then the intake worker must enter into a deferred prosecution agreement, request that a delinquency petition be filed, or close the case. [Wis. Stat. § 938.24\(2r\)\(b\), \(3\), \(4\)](#); *see infra* [ch. 6](#) (intake inquiry).

Next, if tribal officials have advised the intake worker or the prosecutor that a petition has been or may be filed in tribal court, the prosecutor must consult with the tribal officials before filing a petition in juvenile court. [Wis. Stat. § 938.25\(2g\)](#); *see infra* [ch. 7](#) (filing of a petition).

If a petition is filed in juvenile court, the petition must contain a statement indicating that the juvenile is an Indian juvenile and that at the time of the alleged offense the juvenile was both under an order of a tribal court and physically outside the boundaries of the reservation of the Indian tribe of the tribal court and any off-reservation trust land of that Indian tribe or tribal member. [Wis. Stat. § 938.255\(1\)\(cr\)1](#). In addition, the petition must indicate whether a petition has been or may be filed in tribal court. [Wis. Stat. § 938.255\(1\)\(cr\)2](#).

After a petition containing this statement has been filed in juvenile court or if during the pendency of the case the court is informed that a petition has been filed in tribal court, the court must stay the proceedings and consult with tribal officials to determine which court would be the most appropriate forum to handle the matter. [Wis. Stat. § 938.299\(9\)\(a\)](#). If both the juvenile court and the tribal court agree that the best interests of the juvenile and of the public would be served by having the matter heard in tribal court, the juvenile court must dismiss the case without prejudice or stay the proceeding. [Wis. Stat. § 938.299\(9\)\(b\)](#). If the court stays the proceeding, the court retains jurisdiction over the juvenile until one year has elapsed since the last order affecting the stay was entered. [Wis. Stat. § 938.299\(9\)\(c\)](#). While the juvenile court still has jurisdiction over the juvenile, the court may, upon motion and notice to the parties, lift the stay, and take further action in the case. *Id.*

**Note.** These procedures do not apply to an Indian juvenile who commits a delinquent act either (1) *on* the tribe's reservation or off-reservation trust land or (2) *off* the tribe's reservation or off-reservation trust land if the juvenile was off the reservation or off-reservation trust land not because of a tribal court order.

### C. Juveniles Alleged to Be in Need of Protection or Services [§ 4.24]

Under some circumstances, a juvenile who has not committed a delinquent act under [Wis. Stat. § 938.12](#) is still alleged to be in need of protection or services. In those cases, a petition alleging that the juvenile is in need of protection or services (JIPS) may be filed. There are several grounds outlined in [Wis. Stat. § 938.13](#) under which a court may obtain jurisdiction over a juvenile:

- (4) Uncontrollable. The juvenile's parent or guardian signs the petition requesting jurisdiction under this subsection and is unable or needs assistance to control the juvenile.
- (6) Habitually truant from school. Except as provided under [\[Wis. Stat. §\] 938.17\(2\)](#), the juvenile is habitually truant from school and evidence is provided by the school attendance officer that the activities under [\[Wis. Stat. §\] 118.16\(5\)](#) have been completed or were not required to be completed as provided in [\[Wis. Stat. §\] 118.16\(5m\)](#).
- (6m) School dropout. The juvenile is a school dropout, as defined in [\[Wis. Stat. §\] 118.153\(1\)\(b\)](#).
- (7) Habitually truant from home. The juvenile is habitually truant from home and either the juvenile, a parent or guardian, or a relative in whose home the juvenile resides signs the petition requesting jurisdiction and attests in court that reconciliation efforts have been attempted and have failed.
- (12) Delinquent act before age 10. The juvenile is under 10 years of age and has committed a delinquent act.
- (14) Not responsible or not competent. The juvenile has been determined, under [\[Wis. Stat. §\] 938.30\(5\)\(c\)](#), to be not responsible for a delinquent act by reason of mental disease or defect or has been determined, under [\[Wis. Stat. §\] 938.30\(5\)\(d\)](#), to be not competent to proceed.

For the purpose of determining JIPS jurisdiction, a *juvenile* is defined as

a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, "juvenile" does not include a person who has attained 17 years of age.

[Wis. Stat. § 938.02\(10m\)](#).

ICWA also applies to JIPS cases. *Indian juvenile custody proceeding* means a proceeding under [Wis. Stat. § 938.13\(4\)](#), (6), (6m), or (7) that is governed by ICWA, 25 [U.S.C. §§ 1901–1963](#), and "in which an out-of-home care placement may occur." [Wis. Stat. § 938.028\(2\)\(b\)](#). In such proceedings, the ICWA and WICWA jurisdictional requirements outlined in section [4.22](#), *supra*, apply.

Just as the petitioner must prove the alleged grounds in delinquency proceedings, the petitioner must prove that grounds exist to find the juvenile in need of protection or services in a JIPS case. Just as in delinquency cases, the juvenile has the right to contest the petition and can request a trial before the court. It is important, especially for school truancy or dropout cases, that the petition refer to all applicable statutes and that the petitioner prove every element alleged in the petition before the court takes jurisdiction and do so by providing the documentation required in [Wis. Stat. § 938.13](#).



## **D. Children Alleged to Be in Need of Protection or Services**

### **[§ 4.25]**

[Wis. Stat.](#) § 48.13 provides the juvenile court with exclusive original jurisdiction over a child alleged to be in need of protection or services if one of the following applies:

- (1) The child is without a parent or guardian.
- (2) The child has been abandoned.
- (2m) The child's parent has relinquished custody of the child under [\[Wis. Stat. §\] 48.195\(1\)](#).
- (3) The child has been the victim of abuse, ... including injury that is self-inflicted or inflicted by another.
- (3m) The child is at substantial risk of becoming the victim of abuse, ... including injury that is self-inflicted or inflicted by another based on reliable and credible information that another child in the home has been the victim of such abuse.
- (4) The child's parent or guardian signs the petition requesting jurisdiction and is unable or needs assistance to care for or provide necessary special treatment or care for the child.
- (4m) The child's guardian is unable or needs assistance to care for or provide necessary special treatment or care for the child, but is unwilling or unable to sign the petition requesting [CHIPS] jurisdiction ....
- (5) The child has been placed for care or adoption in violation of law.
- (8) The child is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized.
- (9) The child is at least age 12, signs the petition requesting [CHIPS] jurisdiction ... and is in need of special treatment or care which the parent, guardian or legal custodian is unwilling, neglecting, unable or needs assistance to provide.
- (10) The child's parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.
- (10m) The child's parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home.
- (11) The child is suffering emotional damage for which the parent, guardian or legal custodian has neglected, refused or been unable and is neglecting, refusing or unable, for reasons other than poverty, to obtain necessary treatment or to take necessary steps to ameliorate the symptoms.
- (11m) The child is suffering from an alcohol and other drug abuse impairment, exhibited to a severe degree, for which the parent, guardian or legal custodian is neglecting, refusing or unable to provide treatment.
- (13) The child has not been immunized as required by [\[Wis. Stat. §\] 252.04](#) and not exempted under [\[Wis. Stat. §\] 252.04\(3\)](#).
- (14) The child's parent is residing in a qualifying residential family-based treatment facility or will be residing at such a facility at the time of a child's placement with the parent in the facility, signs the petition requesting jurisdiction under [\[Wis. Stat.\] § 48.13\(14\)](#), and, with the [DCF's] consent, requests that the child reside with [the parent] at the qualifying residential family-based treatment facility.

[Wis. Stat.](#) § 48.028(3) provides an exception to juvenile court jurisdiction in cases involving Indian child custody proceedings. *See* [Wis. Stat.](#) § 48.13. An *Indian child custody proceeding* is "a proceeding governed by the federal Indian Child Welfare Act," in which any of the following may occur: (1) an adoptive placement, (2) an out-of-home care placement, (3) a pre-adoptive placement, (4) a termination of parental rights of an Indian child, or (5) a delegation of powers by a parent regarding the care and custody of an Indian child for longer than one year under [Wis. Stat.](#) § 48.979. [Wis. Stat.](#) § 48.028(2)(d).

For the purpose of [Wis. Stat.](#) § 48.13(3) and (3m), *abuse* is defined as (1) physical injury inflicted on a child by other than accidental means; (2) sexual intercourse or sexual contact; (3) sexual exploitation of a child; (4) child trafficking; (5) permitting, allowing, or encouraging a child to engage in prostitution; (6) forcing a child to view or listen to sexual activity; (7) causing a child to expose genitals or

the pubic area (or exposing the genitals or pubic area to a child); or (8) manufacturing methamphetamine in the presence of a child. See [Wis. Stat. § 48.02\(1\)\(a\), \(b\)–\(g\)](#). *Emotional damage*, as relevant to [Wis. Stat. § 48.13\(11\)](#), is defined as harm to a child’s psychological or intellectual functioning, evidenced by severe anxiety, depression, withdrawal, or outward aggressive behavior or a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child’s age and stage of development. See [Wis. Stat. § 48.02\(5j\)](#).

For the purpose of [Wis. Stat. § 48.13\(3\) and \(3m\)](#), *abuse* is defined as (1) physical injury inflicted on a child by other than accidental means; (2) sexual intercourse or sexual contact; (3) sexual exploitation of a child; (4) child trafficking; (5) permitting, allowing, or encouraging a child to engage in prostitution; (6) forcing a child to view or listen to sexual activity; (7) causing a child to expose genitals or the pubic area (or exposing the genitals or pubic area to a child); or (8) manufacturing methamphetamine in the presence of a child. See [Wis. Stat. § 48.02\(1\)\(a\), \(b\)–\(g\)](#). *Emotional damage*, as relevant to [Wis. Stat. § 48.13\(11\)](#), is defined as harm to a child’s psychological or intellectual functioning, evidenced by severe anxiety, depression, withdrawal, or outward aggressive behavior or a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child’s age and stage of development. See [Wis. Stat. § 48.02\(5j\)](#).

The grounds listed in [Wis. Stat. § 48.13](#) provide the only bases for the juvenile court’s jurisdiction over children in need of protection or services. The statutory grounds also represent elements the state or county must prove before the court can adjudicate a child to be in need of protection or services and before the court can continue to exercise its jurisdiction over the child. For example, the court does not have jurisdiction over a child whose parent is in prison unless the child receives inadequate care during the parent’s incarceration. [Wis. Stat. § 48.13\(8\)](#). Even child neglect requires proof of serious danger to the child’s physical health before the juvenile court can exercise its jurisdiction. [Wis. Stat. § 48.13\(10\)](#).

Although allegations based on [Wis. Stat. § 48.13](#) grounds suffice to invoke the court’s jurisdiction, other challenges can be made to the sufficiency of the petition, see *infra* [ch. 8](#) (plea hearing), or to the sufficiency of the evidence at trial. See [chapter 10, infra](#), for a discussion about challenges to the sufficiency of the evidence at CHIPS fact-finding hearings.

## E. Unborn Children Alleged to Be in Need of Protection or Services [§ 4.26]

[Wis. Stat. § 48.133](#) grants the juvenile court exclusive original jurisdiction over an unborn child who is alleged to be in need of protection or services and

whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected and endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.

[Wis. Stat. § 48.133](#). *Unborn child* means “a human being from the time of fertilization to birth.” [Wis. Stat. § 48.02\(19\)](#).

[Wis. Stat. § 48.133](#) also gives the juvenile court exclusive original jurisdiction over expectant mothers of unborn children. For jurisdictional requirements for cases involving child expectant mothers to whom ICWA may apply, see [Wis. Stat. § 48.028\(3\)](#).

**Note.** In a federal court action challenging the constitutionality of the Wisconsin UCHIPS law, the district court initially found the law void for vagueness, but the U.S. Court of Appeals for the Seventh Circuit ultimately vacated the district court’s decision and ruled that the district court should dismiss the case for mootness because the plaintiff (the previously expectant mother) had moved out of Wisconsin by the time of her appeal. *Loertscher v. Anderson*, [893 F.3d 386](#) (7th Cir. 2018), *vacating* [259 F. Supp. 3d 902](#) (W.D. Wis. 2017).

## F. Civil Laws, Ordinances, and Truancy [§ 4.27]

Except as provided under [Wis. Stat. § 938.17](#), [Wis. Stat. § 938.125](#) confers on the juvenile court exclusive jurisdiction over any juvenile alleged to have violated a law punishable by forfeiture or to have violated a county, town, or other municipal ordinance. The municipal court and the juvenile court share concurrent jurisdiction over juveniles 12 years old or older for civil law and ordinance violations. [Wis. Stat. § 938.17\(2\)\(a\)1](#). Municipal courts have exclusive jurisdiction over municipal-traffic-ordinance violations by juveniles 12 to 15 years old. [Wis. Stat. § 938.17\(2\)\(a\)1m](#).

Also, under [Wis. Stat. § 938.125\(2\)](#), the juvenile court has exclusive jurisdiction over any juvenile alleged to have violated a truancy ordinance, but only if the requirements of [Wis. Stat. § 118.16\(5\)](#) have been met or were not required to be completed as provided in [Wis. Stat. § 118.16\(5m\)](#). However, [Wis. Stat. § 938.17\(2\)](#) provides that a municipal court can exercise jurisdiction over a juvenile for violation of

a municipal truancy ordinance enacted under [Wis. Stat. § 118.163](#), regardless of the juvenile's age and whether the juvenile court has jurisdiction under [Wis. Stat. § 938.13\(6\)](#), the JIPS statute. [Wis. Stat. § 938.17\(2\)\(a\)1](#). The municipal court authorized to exercise jurisdiction is the court of the municipality in which are located the administrative offices of the school district where the juvenile is enrolled. If that municipality does not have a truancy ordinance, the municipal court in the municipality in which the juvenile is enrolled can exercise jurisdiction. If that municipality does not have a truancy ordinance, the municipal court where the juvenile resides can exercise jurisdiction, but only if that municipality has adopted an ordinance under [Wis. Stat. § 118.163](#). [Wis. Stat. § 938.17\(2\)\(a\)2.b., c., d.](#)

Courts of criminal or civil jurisdiction have exclusive jurisdiction over proceedings against juveniles under [Wis. Stat. § 167.32](#) or under any local ordinance strictly conforming to [Wis. Stat. § 167.32](#), which governs activities (such as body passing, object passing, and alcohol consumption) that pose threats to safety at sporting events. [Wis. Stat. § 938.17\(3\)](#). (See *State v. Mattson*, 140 Wis. 2d 24, 409 N.W.2d 138 (Ct. App. 1987), for a discussion of conformity under [Wis. Stat. § 343.307](#) for enhancement of traffic violations.) Juveniles convicted under [Wis. Stat. § 167.32](#) (or a strictly conforming ordinance) are treated as adults for sentencing purposes. [Wis. Stat. § 938.17\(3\)](#).

## **G. Traffic, Boating, Snowmobile, All-Terrain Vehicle, Utility Terrain Vehicle, and Limited-Use Off-Highway Motorcycle Violations [§ 4.28]**

Pursuant to [Wis. Stat. § 938.17\(1\)](#), courts of criminal and civil jurisdiction have exclusive jurisdiction in proceedings against juveniles 16 years old or older for violations of the following statutes:

1. [Wis. Stat. § 23.33](#), which regulates all-terrain vehicles and utility terrain vehicles;
2. [Wis. Stat. § 23.335](#), which regulates limited-use off-highway motorcycles;
3. [Wis. Stat. §§ 30.50–30.80](#), which regulate boating, including registration and equipment requirements, as well as rules for the operation of boats, except for violations of [Wis. Stat. § 30.67\(1\)](#) (duty of a boat operator to render aid) when the violations result in death or injury; and
4. [Wis. Stat. chs. 341–351](#), which regulate motor vehicles (including their registration, equipment, and operation), with the exception of
  - a. [Wis. Stat. § 342.06\(2\)](#), which governs application for certificate of title;
  - b. [Wis. Stat. § 344.48\(1\)](#), which creates penalties for “forged proof”; and
  - c. [Wis. Stat. § 346.67\(1\)](#), which involves the duty of a driver upon striking a person or an attended or occupied vehicle if death or injury occurs.

Juveniles convicted of traffic, boating, snowmobile, all-terrain vehicle, utility terrain vehicle, or limited-use off-highway motorcycle offenses by a court of criminal or civil jurisdiction are sentenced as adults, except that the court can disregard any minimum period of incarceration statutorily required for a particular offense. [Wis. Stat. § 938.17\(1\)\(a\)](#).

**Note.** The Wisconsin Supreme Court has held that a rational basis exists for distinguishing between the treatment of juveniles older than 16 years of age who violate the Motor Vehicle Code and those who violate other provisions of the Criminal Code. Consequently, [Wis. Stat. § 938.17](#) does not violate the equal-protection guarantees of the state and federal constitutions. *State v. Hart*, 89 Wis. 2d 58, 64, 277 N.W.2d 843 (1979). Although the defendant in *Hart* challenged [Wis. Stat. § 48.17](#) (1975), the holding applies to the current statute as well, which was renumbered as [Wis. Stat. § 938.17](#) by 1995 Wis. Act 77.

A juvenile ordered incarcerated for less than six months can serve that time only in a juvenile detention facility. [Wis. Stat. § 938.17\(1\)\(b\)](#). If the court orders the juvenile incarcerated for six months or more, the court must petition the juvenile court to order one or more of the dispositions under [Wis. Stat. § 938.34](#), including placement in a juvenile correctional facility or a secured residential care center for children and youth. [Wis. Stat. § 938.17\(1\)\(c\)](#). [Wis. Stat. § 938.34](#) governs dispositions in delinquency cases. See *infra* [ch. 11](#) (dispositional hearings).

**Comment.** Under [Wis. Stat. § 938.17](#), then, a juvenile charged under [Wis. Stat. § 346.67](#) with hit-and-run causing injury or death cannot face prosecution in criminal court unless first waived into adult criminal court. However, a juvenile accused under [Wis. Stat. § 346.04\(3\)](#) of fleeing an officer, with injury or death resulting, can be prosecuted originally in adult court without first being waived. The legislative history of the statute indicates that this dichotomy resulted from legislative oversight.

## H. Wis. Stat.

### Chs. 51 and 55 [§ 4.29]

[Wis. Stat.](#) §§ 48.135 and 938.135 provide that [Wis. Stat.](#) ch. 51 (Mental Health Act) and [Wis. Stat.](#) ch. 55 (protective placement and services) govern any voluntary or involuntary admission, placement, or commitment of a child to an inpatient mental health facility. [Wis. Stat.](#) §§ 48.135(2), 938.135(2). [Wis. Stat.](#) § 938.135(2) contains an exception, however, for commitments under [Wis. Stat.](#) § 938.34(6)(am) (for a juvenile in need of special treatment or care). Except as provided in [Wis. Stat.](#) §§ 48.193–48.213, such admissions, placements, or commitments of an adult expectant mother of an unborn child are governed by [Wis. Stat.](#) ch. 51. [Wis. Stat.](#) § 48.135(2); *see also infra* [ch. 5](#) (physical custody).

If a child alleged to be delinquent or in need of protection and services or an expectant mother of an unborn child alleged to be in need of protection or services appears to suffer from a mental illness, alcoholism, drug dependency, or a developmental disability, the court *may* proceed under [Wis. Stat.](#) ch. 51 or [Wis. Stat.](#) ch. 55. [Wis. Stat.](#) §§ 48.135(1), 938.135(1). [Wis. Stat.](#) § 51.20(6) provides that hearings for involuntary commitments of minors occur in juvenile court. Voluntary commitment of a minor without parental approval can take place in juvenile court under [Wis. Stat.](#) § 51.13(1)(c). A child cannot be protectively placed under [Wis. Stat.](#) ch. 55 unless the child is alleged to have a developmental disability, in which case the child must be at least 14 years old. [Wis. Stat.](#) § 55.06.

### I. Waiver of Parental Consent to Abortion [§ 4.30]

Any circuit court in Wisconsin has jurisdiction over a proceeding under [Wis. Stat.](#) § 48.375(7) for waiver of the parental consent requirement under [Wis. Stat.](#) § 48.375(4) for a minor’s abortion. [Wis. Stat.](#) § 48.16; *see also infra* [ch. 18](#) (parental consent for abortions).

**Note.** Wisconsin has not yet resolved whether the statutory ban on abortions under [Wis. Stat.](#) § 940.04 is enforceable since the U.S. Supreme Court’s decision in [Dobbs v. Jackson Women’s Health Organization](#), 142 S. Ct. 2228 (2022); *see infra* [ch. 18](#).

### J. Jurisdiction over Adults [§ 4.31]

Several provisions in the Children’s Code and Juvenile Justice Code apply to adults, including those juveniles who remain under the jurisdiction of the juvenile court even after reaching the age of 17. *See supra* §§ [4.11–14](#).

Some of these provisions confer authority on the juvenile court to enforce conditions of its orders that apply to parents and other adults. Under [Wis. Stat.](#) § 48.45(1m)(a) and [Wis. Stat.](#) § 938.45(1m)(a), the juvenile court judge can order the child’s parent, guardian, or legal custodian to comply with “any conditions determined by the judge to be necessary for the child’s welfare,” [Wis. Stat.](#) § 48.45(1m)(a), or “juvenile’s welfare,” [Wis. Stat.](#) § 938.45(1m)(a), including participation in mental health treatment, anger management, individual or family counseling, and parenting classes. The statute authorizes contempt as a sanction for adults who fail to comply with the terms of the order. [Wis. Stat.](#) §§ 48.45(2), 938.45(2).

To ensure that violations of the parent’s constitutional due-process rights do not occur, the court can order a parent to undergo involuntary, inpatient treatment only after following the procedures mandated under [Wis. Stat.](#) chs. 51 and 55. [Wis. Stat.](#) §§ 48.45(1m)(b), 938.45(1m)(b); *see also* *C.S. v. Racine Cty. (In re Finding of Contempt in the Int. of J.S.)*, 137 Wis. 2d 217, 404 N.W.2d 79 (Ct. App. 1987).

Some acts or omissions by a parent or other adult can serve as grounds for criminal charges under [Wis. Stat.](#) ch. 948 (crimes against children) or under other applicable criminal statutes. [Wis. Stat.](#) §§ 48.45(2), (3), 938.45(2), (3).

### K. Other Matters [§ 4.32]

[Wis. Stat.](#) §§ 48.14 and 938.14 list other matters over which the juvenile court has exclusive jurisdiction:

1. Termination of parental rights, [Wis. Stat.](#) § 48.14(1); *see also infra* [ch. 17](#) (termination of parental rights);
2. Appointment and removal of a guardian in limited cases, as specified under [Wis. Stat.](#) § 48.14(2);
3. Adoption of children, [Wis. Stat.](#) § 48.14(3);

**Note.** The topic of adoption is not addressed in this handbook. *See generally* Matthew W. Giesfeldt, [Termination of Parental Rights and Adoption](#) (State Bar of Wis. 3d ed. 2017 & Supp.); Theresa L. Roetter, *Independent Adoption: Representing Adoptive Parents*, in 2



[Wisconsin Attorney's Desk Reference](#) (State Bar of Wis. 11th ed. 2022); [Wisconsin Judicial Benchbooks IV: Juvenile](#) ch. 14 (State Bar of Wis. 7th ed. 2022) (adoption).

4. Proceedings under the Interstate Compact for Juveniles, [Wis. Stat.](#) § 938.14;
5. Proceedings under [Wis. Stat.](#) chs. 51 and 55 relating to children, [Wis. Stat.](#) § 48.14(5); *see also supra* § 4.29;
6. Consent to marry under [Wis. Stat.](#) § 765.02, [Wis. Stat.](#) § 48.14(6);
7. Appeals under [Wis. Stat.](#) § 115.80(7) of a local educational agency's decision (e.g., a school district's decision) regarding an educational evaluation, individualized education program, or educational placement of a child with a disability, [Wis. Stat.](#) § 48.14(7);
8. Matters relating to runaway children, for the limited purpose provided under [Wis. Stat.](#) § 48.227, which governs runaway homes, [Wis. Stat.](#) § 48.14(8); *see also* [Wis. Stat.](#) § 938.13(7) (providing exclusive jurisdiction over runaway juveniles who are in need of protection and services); *supra* § 4.24;
9. Proceedings under [Wis. Stat.](#) § 146.34(5), which governs the donation of bone marrow by a minor, [Wis. Stat.](#) § 48.14(9);
10. Proceedings for child abuse restraining orders and injunctions under [Wis. Stat.](#) § 813.122 if the respondent is a child, [Wis. Stat.](#) § 48.14(10);
11. Proceedings for harassment restraining orders and injunctions under [Wis. Stat.](#) § 813.125 if the respondent is a child, *id.*;
12. Granting of visitation privileges under [Wis. Stat.](#) § 48.9795(12), [Wis. Stat.](#) § 48.14(11);
13. Proceedings under the Wisconsin Indian Child Welfare Act, [Wis. Stat.](#) § 48.028(8), for the return of an Indian child to his or her former parent or former Indian custodian following a vacation or setting aside of an adoption order or following a voluntary termination-of-parental-rights order, [Wis. Stat.](#) § 48.14(12).
14. Appointment and removal of a guardian of the person for a child under [Wis. Stat.](#) § 48.9795, [Wis. Stat.](#) § 48.14(13).

**Note.** The topic of minor guardianship under [Wis. Stat.](#) § 48.9795 is not addressed in this handbook. *See generally* Henry J. Plum, [Minor Guardianships of the Person: Wisconsin Children's Court Practice and Procedure](#) (State Bar of Wis. 2020).

## L. Concurrent Jurisdiction with Other Courts in Determining Legal Custody [§ 4.33]

Except as provided by WICWA, *see* [Wis. Stat.](#) §§ 48.028(3), 938.028(3), the jurisdiction of the juvenile court is “paramount” in all cases involving children, unborn children, and expectant mothers alleged to come within the provisions of [Wis. Stat.](#) §§ 48.13, 48.133, 48.14, and 938.12–14. [Wis. Stat.](#) §§ 48.15, 938.15.

However, the statutes do not deprive other courts of the authority to determine the legal custody of children by habeas corpus, *see* [Wis. Stat.](#) ch. 782, or to determine legal custody or guardianship of children if determination of the question “is incidental to the determination of an action pending in that court,” [Wis. Stat.](#) §§ 48.15, 938.15, as could occur in divorce cases.

The juvenile court has the ability to modify family court orders when terminating supervision in [Wis. Stat.](#) ch. 48 CHIPS cases and [Wis. Stat.](#) ch. 938 delinquency and JIPS cases. [Wis. Stat.](#) §§ 48.355(4g) and 938.355(4g) allow for the creation of case-closure orders, which have the effect of modifying certain provisions of family court orders, and can be used to change custody, placement, visitation, and child-support orders.

## III. Venue: [Wis. Stat.](#) §§ 48.185 and 938.185 [§ 4.34]

### A. In General [§ 4.35]

Venue refers to the procedural matter of designating the appropriate geographic division of the state in which to try an action. *State v. Dombrowski*, 44 Wis. 2d 486, 501–02, 171 N.W.2d 349 (1969). Venue in juvenile court cases is much broader than that in adult criminal court cases. *See* [Wis. Stat.](#) § 971.19.

## B. Delinquency, JIPS, Waiver, and Civil Law and Ordinance Violations [§ 4.36]

Most delinquency ([Wis. Stat. § 938.12](#)), JIPS ([Wis. Stat. § 938.13](#)), and waiver proceedings ([Wis. Stat. § 938.18](#)), as well as proceedings for civil-law and ordinance violations, can be brought in the county where the juvenile lives, where the juvenile is present, or where the violation occurred. [Wis. Stat. § 938.185\(1\)\(a\), \(b\), \(c\)](#); see *State v. Corey J.G. (In the Int. of Corey J.G.)*, 215 Wis. 2d 395, 572 N.W.2d 845 (1998) (interpreting precursor to [Wis. Stat. § 938.185](#), former [Wis. Stat. § 48.185](#) (1993–94)). After adjudicating a juvenile as delinquent, the court of the county where the violation occurred can transfer the case for disposition to the county where the juvenile resides if the county of residence agrees to the transfer. [Wis. Stat. § 938.185\(1\)\(c\)](#).

A juvenile court's decision to grant a waiver petition gives any proper criminal court in Wisconsin jurisdiction to proceed with the case. In some instances, venue might change from the county in which the original juvenile court waiver occurred to the county in which a later criminal complaint is filed. See *State v. Hinkle*, 2019 WI 96, [389 Wis. 2d 1](#), 935 N.W.2d 271 (holding that Fond du Lac County Circuit Court properly relied on Milwaukee County Circuit Court's prior waiver of defendant from juvenile court to adult court when Fond du Lac moved defendant from juvenile jurisdiction to adult jurisdiction).

Venue for delinquency proceedings or delinquency-based JIPS proceedings for an alleged violation of [Wis. Stat. § 301.45\(6\)\(a\)](#) or (ag) (failure to comply with sex-offender registration requirements) can occur in the county where the juvenile resided when the petition was filed. [Wis. Stat. § 938.185\(3\)](#). If the juvenile did not have a county of residence in Wisconsin at the time of filing, or if the juvenile's county of residence was unknown at the time that the petition was filed, venue for the proceeding may be in any of the following:

1. Any county in which the juvenile has resided while subject to [Wis. Stat. § 301.45](#);
2. The county in which the juvenile was adjudicated delinquent or found not responsible by mental disease or defect for the sexual offense;
3. The county in which the juvenile was found to be a sexually violent person under [Wis. Stat. ch. 980](#), if the juvenile was required to register under [Wis. Stat. § 301.45\(1g\)\(dt\)](#); or
4. Any Wisconsin county in which the juvenile has been a student or has been employed or been carrying on a vocation, if the juvenile is required to register only under [Wis. Stat. § 301.45\(1g\)\(f\)](#) or (g).

See generally [Wis. Stat. § 938.185\(3\)](#).

When an Indian juvenile has allegedly committed a delinquent act, venue for a delinquency proceeding or a delinquency-based JIPS proceeding may not be in the county where the juvenile resides if all the following apply: (1) the juvenile was subject to an order of a tribal court at the time of the alleged violation; (2) the juvenile was outside the boundaries of the reservation of the Indian tribe of the tribal court and any off-reservation trust land of either that Indian tribe or member of that Indian tribe as a direct consequence of a tribal court order under [Wis. Stat. § 938.185\(4\)\(a\)](#) (at the time of the alleged violation); and (3) a petition relating to the alleged violation has been filed in tribal court. [Wis. Stat. § 938.185\(4\)](#).

**Note.** If the Indian juvenile's county of residence is also either the county where the Indian juvenile is present or the county where the violation occurred, then venue can be had in the Indian juvenile's county of residence. *Id.*; see also [Wis. Stat. § 938.185\(1\)\(b\), \(c\)](#).

## C. Children or Unborn Children in Need of Protection and Services [§ 4.37]

CHIPS and UCHIPS cases can be brought either where the child or expectant mother of an unborn child lives or where the child or expectant mother is present. [Wis. Stat. § 48.185\(1\)](#).

## D. Guardianship Under [Wis. Stat. § 48.977](#) and Termination of Parental Rights [§ 4.38]

Venue for termination-of-parental-rights cases depends on whether the termination is voluntary or involuntary. Venue for voluntary termination-of-parental-rights cases lies in the county where the birth parent or the child lives when the petition is filed. [Wis. Stat. § 48.185\(2\)](#). For involuntary termination-of-parental-rights cases in which the child has been placed outside the home pursuant to a CHIPS dispositional order, venue attaches to the county where the dispositional order was issued unless the child's county of residence has changed or the parent of the child has resided in a different Wisconsin county for six months. *Id.* The same provisions apply to venue in guardianship

proceedings under [Wis. Stat.](#) § 48.977. On motion and for good cause, the juvenile court can transfer the case to the current county of residence of the child or parent. *Id.*

#### **E. Extended Out-of-Home Care [§ 4.39]**

Venue for a proceeding for extended out-of-home care for a child under [Wis. Stat.](#) § 48.366(3)(am) or for a juvenile under [Wis. Stat.](#) § 938.366(3)(am) is in the county where the most recent order specified in [Wis. Stat.](#) § 48.366(1)(a) or (b) or in [Wis. Stat.](#) § 938.366(1)(a) was issued. [Wis. Stat.](#) §§ 48.185(3), 938.185(2m).

#### **F. Changes in Placement, Revision, and Extension of CHIPS, UCHIPS, and JIPS Dispositional Orders [§ 4.40]**

Venue for changes in placement, revisions, and extensions of dispositional orders is in the county where the original dispositional order was issued unless, before the proceeding, the court of that county determined that proper venue lies in another county and transferred the case, along with all appropriate records, to that other county. [Wis. Stat.](#) §§ 48.185(4), 938.185(2).

#### **G. Change in Placement; Posttermination of Parental Rights [§ 4.41]**

Venue for a proceeding under [Wis. Stat.](#) § 48.437, for a change in placement after entry of an order for termination of parental rights, is in the county where the termination-of-parental-rights order was issued. [Wis. Stat.](#) § 48.185(5).

### **IV. Charts [§ 4.42]**

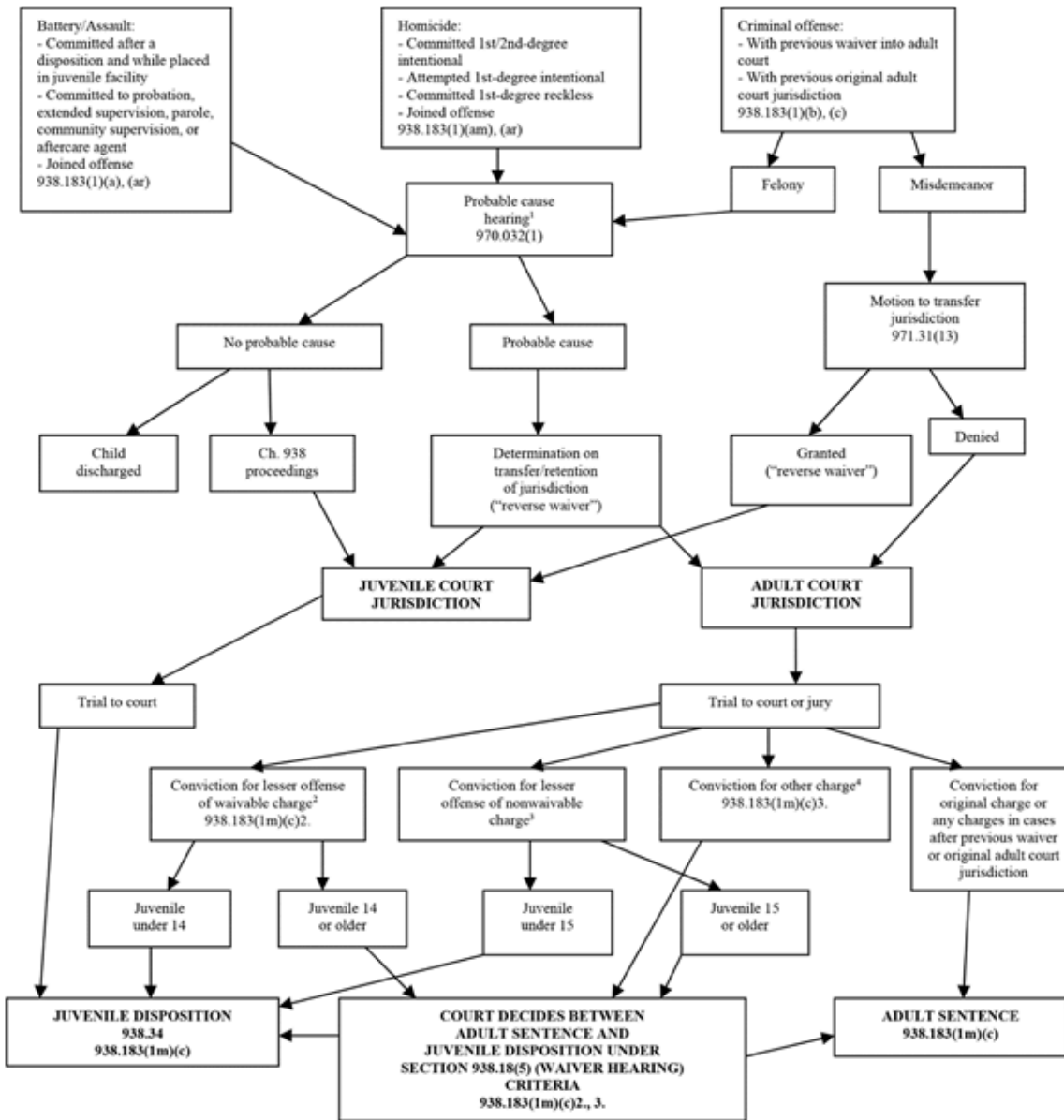
#### **A. Jurisdiction Under [Wis. Stat.](#) Ch. 938 by Age and Offense [§ 4.43]**

|  | Birth | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 |
|--|-------|----|----|----|----|----|----|----|----|----|
| <b>JUVENILE COURT JURISDICTION</b>   |       |    |    |    |    |    |    |    |    |    |
| <b>Generally</b>   |       |    |    |    |    |    |    |    |    |    |
| • JIPS<br>938.13   |       |    |    |    |    |    |    |    |    | →  |
| • Delinquency<br>938.12  |       |    |    |    |    |    |    |    |    | →  |
| <b>Waiver of Jurisdiction</b>  |       |    |    |    |    |    |    |    |    |    |
| • Violation of any state criminal law<br>938.18(1)(c)  |       |    |    |    |    |    |    |    |    | →  |
| • Certain enumerated criminal violations <sup>1</sup><br>938.18(1)(a), (b)   |       |    |    |    |    |    |    |    |    | →  |
| <b>ADULT COURT JURISDICTION</b>  |       |    |    |    |    |    |    |    |    |    |
| <b>Generally</b>   |       |    |    |    |    |    |    |    |    |    |
| • Criminal violations, generally   |       |    |    |    |    |    |    |    |    | →  |
| • Battery or assault by prisoner; 1st- or 2nd-degree intentional homicide; 1st-degree reckless homicide; any offense joined to these offenses<br>938.183(1)(a), (am), (ar) |       |    |    |    |    |    |    |    |    | →  |
| • Previous waiver into adult court or previous violation subject to original adult court jurisdiction<br>938.183(1)(b), (c)  |       |    |    |    |    |    |    |    |    | →  |
| <b>Reverse Waiver of Jurisdiction</b>  |       |    |    |    |    |    |    |    |    |    |
| • Available generally<br>938.183, 970.032, 971.31(13)  |       |    |    |    |    |    |    |    |    | →  |

NOTE: Adapted from chart drafted by Attorney David N. Zerwick, Office of the State Public Defender.

<sup>1</sup> Included are (1) violations of (a) Wis. Stat. § 961.41(1) (manufacture, distribution, or delivery of a controlled substance or controlled substance analog), (b) Wis. Stat. § 940.03 (felony murder), (c) Wis. Stat. § 940.06 (second-degree reckless homicide), (d) Wis. Stat. § 940.225(1) or (2) (first- or second-degree sexual assault), (e) Wis. Stat. § 940.305 (taking hostages), (f) Wis. Stat. § 940.31 (kidnapping), (g) Wis. Stat. § 943.10(2) (various forms of aggravated burglary, including armed burglary), (h) Wis. Stat. § 943.32(2) (armed robbery), or (i) Wis. Stat. § 943.87 (robbery of financial institution); and (2) felonies committed at the request of, or for the benefit of, a criminal gang.

## B. Original Adult Court Jurisdiction: Procedure [§ 4.44]



NOTE: Adapted from chart drafted by Attorney David N. Zerwick, Office of the State Public Defender.

<sup>1</sup> That is, the court must determine whether there is probable cause to believe that the juvenile committed the violation of which he or she is accused under the circumstances specified in Wis. Stat. § 938.183(1)(a), (am), (ar), (b), or (c).

<sup>2</sup> That is, a conviction for one of the offenses listed under Wis. Stat. § 938.18(1)(a) or (b).

<sup>3</sup> That is, a conviction for an offense that is not one of the offenses listed under Wis. Stat. § 938.18(1)(a) or (b).

<sup>4</sup> That is, a conviction for attempted first-degree intentional homicide under Wis. Stat. § 940.01; first-degree reckless homicide under Wis. Stat. § 940.02; or second-degree intentional homicide under Wis. Stat. § 940.05.

## V. Practice Form [§ 4.45]

The form in this section is offered as a practice guide. Always check original sources of authority for current law. When using the sample form, also check local practice and adapt the form language to fit the individual client's circumstances. Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System's website, at <https://www.wicourts.gov/forms1/circuit.htm>. A list of those standard court forms is included in [appendix B](#), *infra*.

**A. Motion for Change of Venue (Form CRM-0174) [§ 4.46]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_

In the Interest of,

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_





## MOTION FOR CHANGE OF VENUE <sup>171</sup>

---

1. (Juvenile's name), by *(his) (her)* attorney, moves the court for a change of venue of this action to *(name of county)* County.

2. The grounds for this motion are as follows.

a. Under [Wis. Stat. § 938.185](#), venue for any proceedings in this action may be in the county where the juvenile resides, where *(he) (she)* is present, or where the alleged violation occurred.

b. On (date), (juvenile's name) was taken into custody in (name of county) for allegedly *(describe act)*. The delinquent act is alleged to have occurred in (name of county).

c. (Juvenile's name) is presently in custody in (name of county) pursuant to the order of (judge's name), entered (date).

d. (Juvenile's name) and *(his) (her)* parents reside in (name of county), and this is the juvenile's legal domicile.

*(Add appropriate alternative(s))*

e. The alleged victim and all the important witnesses in this action are present in (name of county).

f. Forcing (juvenile's name) to defend *(himself) (herself)* in proceedings occurring in (name of county) would seriously injure *(his) (her)* ability to put on an effective case in *(his) (her)* own behalf, because (state reason(s)).

g. Forcing (juvenile's name) to defend *(himself) (herself)* in proceedings occurring in (name of county) would create a hardship for *(his) (her)* parents, because they reside and work in (name of county).

h. Forcing the juvenile to participate in proceedings in (name of county) would be disruptive of any treatment programs that might be implemented as a result of court action, because the appropriate court to implement and supervise such treatment is that in (name of county), where (juvenile's name) and *(his) (her)* family reside.

Dated: \_\_\_\_\_

*(Firm/Office name)*

Attorneys for the *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
(Attorney's name)

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone no.)*

State Bar No. \_\_\_\_\_

## VI. Standard Juvenile Court Forms [§ 4.47]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

### Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938 Wisconsin Records Management Committee

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose  |
|--------------------------|---------------------------|--|--|
| <a href="#">IW</a> -1724 | Both                      | Notice of hearing (juvenile)—Indian Child Welfare Act        | Notice informing interested persons of the scheduling of court proceedings in a case involving a child who is subject to ICWA  |
| <a href="#">JD</a> -1722 | Ch. 938                   | Petition for waiver of jurisdiction                          | Petition requesting the court to waive the juvenile into adult criminal court  |
| <a href="#">JD</a> -1723 | Ch. 938                   | Order waiving juvenile court jurisdiction                    | Court order referring a juvenile into adult criminal court   |
| <a href="#">JD</a> -1724 | Both                      | Notice of hearing (juvenile)                                 | Notice to interested persons of the scheduling of court proceedings  |
| <a href="#">JD</a> -1725 | Ch. 938                   | Notice to school board                                       | Notice to school board of a felony delinquency petition; adjudication of delinquency; school enrollment as result of a dispositional order; school attendance as condition of a CHIPS, JIPS, or delinquency dispositional order; and other information required to be provided to the school board |
| <a href="#">JD</a> -1765 | Both                      | Order granting temporary extension                           | Court order granting a request for a temporary extension of a dispositional order to accommodate a hearing before termination  |
| CR-223                   | Adult Court               | Original adult court jurisdiction order                      | Order transferring an original adult court jurisdiction case from adult criminal court to juvenile court   |
| CR-224                   | Adult Court               | Judgment of conviction imposing a juvenile court disposition | Court order in adult criminal court imposing a juvenile court disposition  |

## Supplement Chapter 5

### Physical Custody

Book sections supplemented: [5.1](#), [5.4](#), [5.11](#), [5.15](#), [5.42](#), and [5.60](#)

#### 5.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to the Wisconsin Administrative Code are current through rules promulgated in Wis. Admin. Reg., Sept. 2024, No. 825.

## 5.4 [Definitions and Other General Provisions] Places for Holding Child or Expectant Mother in Physical Custody

[Page 3: Amended paragraph 1. in first numbered list in section](#)

1. The home of a parent, guardian, relative, or like-kin, provided that the person has not been convicted of first-degree or second-degree intentional homicide of a parent of the child, and the conviction has not been reversed, set aside, or vacated, unless the person making the custody decision determines by clear and convincing evidence that the placement would be in the best interests of the child, [Wis. Stat.](#) §§ 48.207(1)(a), (b), 938.207(1)(a), (b), *as amended by 2023 Wis. Act 119* (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice);

[Page 4: Amended paragraph 5. in first numbered list in section](#)

5. The home of a nonrelative or like-kin if placement does not last more than 30 days (although this time may be extended) and if the person has not had a foster home license refused, revoked, or suspended within the preceding two years, [Wis. Stat.](#) §§ 48.207(1)(f), 938.207(1)(f), *as amended by 2023 Wis. Act 119* (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice);

## 5.11 Release or Delivery from Custody

[Page 9: Replaced Note](#)

**Note.** While [Wis. Stat.](#) § 51.15(1) requires as a basis for emergency detention evidence of a substantial probability of physical impairment or injury to self or other individuals because of impaired judgment, as manifested by evidence of a recent act or omission, [Wis. Stat.](#) §§ 48.20(5) and 938.20(5) require a *very* substantial probability of physical impairment or injury to the child when the child's impaired judgment is the cause.

## 5.15 [Criteria for Keeping Child or Expectant Mother in Custody] Holding Child in Juvenile Detention Facility

[Pages 11–12: Amended Wis. Stat. citation for carjacking in Note after paragraph 1. in numbered list in section](#)

**Note.** Felonies listed under [Wis. Stat.](#) § 938.208(1)(a) include first-degree intentional homicide under [Wis. Stat.](#) § 940.01; first-degree reckless homicide under [Wis. Stat.](#) § 940.02; felony murder under [Wis. Stat.](#) § 940.03; second-degree intentional homicide under [Wis. Stat.](#) § 940.05; aggravated battery under [Wis. Stat.](#) § 940.19(2)–(6); physical abuse of an elder person under [Wis. Stat.](#) § 940.198; mayhem under [Wis. Stat.](#) § 940.21; first-degree sexual assault under [Wis. Stat.](#) § 940.225(1); kidnapping under [Wis. Stat.](#) § 940.31; endangering safety by use of a dangerous weapon under [Wis. Stat.](#) § 941.20(3); arson under [Wis. Stat.](#) § 943.02(1); carjacking under [Wis. Stat.](#) § 943.231(1); armed robbery under [Wis. Stat.](#) § 943.32(2); harassment under [Wis. Stat.](#) § 947.013(1t), (1v), or (1x); first-degree sexual assault of a child under [Wis. Stat.](#) § 948.02(1); second-degree sexual assault of a child under [Wis. Stat.](#) § 948.02(2); repeated sexual assault of the same child under [Wis. Stat.](#) § 948.025; physical abuse of a child under [Wis. Stat.](#) § 948.03; and sexual assault of a child placed in substitute care under [Wis. Stat.](#) § 948.085(2).

## 5.42 [Postadjudication Commitment to Secure Custody] Disposition Under [Wis. Stat.](#) § 938.34(4m)

[Page 24: Amended paragraph 12. in second numbered list in section](#)

12. Carjacking under [Wis. Stat.](#) § 943.231(1);

## 5.60 Standard Juvenile Court Forms

[Page 49: Amended Name of Form and Purpose description for Form JD-1770 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose  |
|-------------|---------------------------|---|--|
| JD-1770     | Ch. 938                   | Short term detention—pending investigation/as a consequence/crisis intervention | Document authorizing custody hold of juvenile pending investigation of an alleged violation of a dispositional order, as a consequence for violation of a dispositional order, or if crisis intervention is required |

## Chapter 5

### Physical Custody

#### I. [Scope of Chapter](#)

##### [§ 5.1]

This chapter discusses taking and holding a child or expectant mother in physical custody, both before and after adjudication in juvenile court proceedings.<sup>1</sup>

The Wisconsin Children’s Code and Juvenile Justice Code create a presumption against removing a child or expectant mother from the home and placing the child or expectant mother in custody. The state or county must follow certain procedures and satisfy certain criteria to take a child or expectant mother into physical custody, and the court must expeditiously review these procedures and criteria. Before ordering a child or expectant mother held in custody, the state or county must demonstrate that doing so is needed and that it has chosen the least restrictive means available.

#### II. Definitions and Other General Provisions [§ 5.2]

##### A. Types of Custody [§ 5.3]

Both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 distinguish legal custody and physical custody. The definitions appear in [Wis. Stat.](#) §§ 48.02 and 938.02. [Wis. Stat.](#) § 48.02(12) defines *legal custody* as

a legal status created by the order of a court, which confers the right and duty to protect, train and discipline the child, and to provide food, shelter, legal services, education and ordinary medical and dental care, subject to the rights, duties and responsibilities of the guardian of the child and subject to any residual parental rights and responsibilities and the provisions of any court order.

[Wis. Stat.](#) § 48.02(12). [Wis. Stat.](#) § 938.02(12) offers the same definition but refers to “juvenile” instead of “child.” [Wis. Stat.](#) § 938.02(12).

The statutes define *physical custody* as “actual custody of the person in the absence of a court order granting legal custody to the physical custodian.” [Wis. Stat.](#) §§ 48.02(14), 938.02(14).

Under both the Children’s Code and the Juvenile Justice Code, the court can order physical custody of a child outside the home in emergency situations, pending the filing of a formal petition, throughout the adjudicative stage, and as a dispositional or postdispositional alternative. The Children’s Code authorizes courts to make similar orders regarding expectant mothers. Some dispositions in cases involving children in need of protection or services (CHIPS), juveniles in need of protection or services (JIPS), or delinquency include transferring legal custody of the child. [Wis. Stat.](#) §§ 48.345(4), 938.34(4), 938.345(1); *see also infra* [ch. 11](#) (dispositional hearings).

##### B. [Places for Holding Child or Expectant Mother in Physical Custody](#)

## [§ 5.4]

Under the Children’s Code and the Juvenile Justice Code, a child or expectant mother can be held in secure or nonsecure physical custody. The level of restriction permitted for the physical placement of a particular child or expectant mother depends on the satisfaction of certain criteria, discussed in sections [5.12–16](#), *infra*.

[Wis. Stat.](#) §§ 48.207(1) and 938.207(1) list the places for holding a child or child expectant mother in nonsecure custody:

1. The home of a parent, guardian, or relative, provided that the person has not been convicted of the first-degree or second-degree intentional homicide of a parent of the child, and the conviction has not been reversed, set aside, or vacated, unless the person making the custody decision determines by clear and convincing evidence that the placement would be in the best interests of the child, [Wis. Stat.](#) §§ 48.207(1)(a), (b), 938.207(1)(a), (b);
2. A licensed foster home or group home, [Wis. Stat.](#) §§ 48.207(1)(c), (cm), 938.207(1)(c), (cm); *see also* [Wis. Stat.](#) § 48.02(6) (defining “foster home”), (7) (defining “group home”); [Wis. Admin. Code](#) ch. DCF 56 (foster home care for children);
3. A nonsecure facility operated by a licensed child welfare agency, [Wis. Stat.](#) §§ 48.207(1)(d), 938.207(1)(d);
4. A licensed shelter care facility, [Wis. Stat.](#) §§ 48.207(1)(e), 938.207(1)(e); *see also* [Wis. Stat.](#) §§ 48.02(17), 938.02(17) (defining *shelter care facility* as a nonsecure place (including a holdover room) licensed by the Department of Children and Families (DCF) under [Wis. Stat.](#) § 48.66 for the temporary care and physical custody of children);
5. The home of a nonrelative if placement does not last more than 30 days (although this time may be extended) and if the person has not had a foster home license refused, revoked, or suspended within the preceding two years, [Wis. Stat.](#) §§ 48.207(1)(f), 938.207(1)(f);
6. Some hospitals, [Wis. Stat.](#) § 50.33(2)(a), (c), a physician’s office, an approved public treatment facility for emergency treatment, or a facility for detention under [Wis. Stat.](#) § 51.15(2)(d) (only if the facility is approved by the Wisconsin Department of Health Services or the county department of community programs and agrees to detain the child or is a state treatment facility), for those children held under [Wis. Stat.](#) §§ 48.20(4), (4m), (5), and (6), and 938.20(4), (5), and (6), [Wis. Stat.](#) §§ 48.207(1)(g), (h), (i), 938.207(1)(g), (h), (i);

**Note.** [Wis. Stat.](#) §§ 48.20(4) and 938.20(4) apply to a child “believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt treatment.” [Wis. Stat.](#) § 48.20(4m) applies to a child expectant mother or an unborn child who is “believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt treatment.” [Wis. Stat.](#) §§ 48.20(5) and 938.20(5) apply if a child is believed to be mentally ill, drug dependent, or developmentally disabled and exhibits conduct constituting a substantial probability of physical harm to self or others, or if a “very substantial probability of physical impairment or injury” to self or others exists because of the child’s impaired judgment; in such a case, the standards for emergency detention under [Wis. Stat.](#) § 51.15 must be met. [Wis. Stat.](#) §§ 48.20(6) and 938.20(6) apply to a child “believed to be an intoxicated person who has threatened, attempted or inflicted physical harm on himself or herself or on another and is likely to inflict such physical harm unless committed, or is incapacitated by alcohol or another drug.”

7. A county children’s home under [Wis. Stat.](#) § 48.58, [Wis. Stat.](#) §§ 48.207(1)(k), 938.207(1)(k); and
8. With a parent in a qualifying residential family-based treatment facility if the child’s permanency plan includes a recommendation for such a placement, *see* [Wis. Stat.](#) § 48.38(4)(em), before the placement is made and the parent consents to the placement. [Wis. Stat.](#) § 48.207(1)(L).

An adult expectant mother may be held in nonsecure custody in

1. The home of an adult relative or friend, [Wis. Stat.](#) § 48.207(1m)(a);
2. A licensed community-based residential facility, [Wis. Stat.](#) § 48.207(1m)(b);
3. Some hospitals, [Wis. Stat.](#) §§ 48.207(1m)(c), 50.33(2)(a), (c); or
4. A physician’s office, an approved public treatment facility for emergency treatment, or a facility for detention under [Wis. Stat.](#) § 51.15(2)(d) for those expectant mothers held under [Wis. Stat.](#) § 48.203(3), (4), or (5), [Wis. Stat.](#) § 48.207(1m)(c), (d), (e).

**Note.** [Wis. Stat.](#) § 48.203(3) applies to unborn children or adult expectant mothers “believed to be suffering from a serious physical condition which requires either prompt diagnosis or prompt treatment.” [Wis. Stat.](#) § 48.203(4) applies if an adult expectant mother is “believed to be mentally ill, drug dependent or developmentally disabled, and exhibits conduct which constitutes a substantial probability of physical harm to herself or others, or a substantial probability of physical impairment or injury to the mother exists due to her impaired judgment and the standards of [[Wis. Stat.](#) §] 51.15 are met.” [Wis. Stat.](#) § 48.203(5) applies if the adult expectant mother “is believed to be an intoxicated person who has threatened, attempted or inflicted physical harm on herself unless committed, or is incapacitated by alcohol.”

Children taken into custody under [Wis. Stat.](#) § 48.981 based on reported abuse or neglect can be held in a hospital, foster home, relative’s home, or any other appropriate medical or child welfare facility not used primarily for the detention of delinquent children. [Wis. Stat.](#) § 48.207(3).

Under certain circumstances, children may be held temporarily in secure custody. Children may be held temporarily preadjudication, as a sanction under [Wis. Stat.](#) § 938.355(6) or (6d) for failure to comply with a dispositional order or as a condition of a dispositional order under [Wis. Stat.](#) § 938.34(3)(f). Children held temporarily in secure custody must be held in secure, locked detention facilities expressly designed for that purpose. See [Wis. Stat.](#) §§ 48.02(10r), 938.02(10r) (defining “juvenile detention facility”). The facility must be approved by the Department of Corrections under [Wis. Stat.](#) § 301.36.

A county jail can serve as a juvenile detention facility but only under the circumstances described in section [5.16, infra](#). See [Wis. Stat.](#) §§ 48.209, 938.209.

**Comment.** The Wisconsin Legislature has enacted legislation as part of an initiative to close the state’s Type 1 juvenile correctional facility at Lincoln Hills. In 2018, the legislature enacted 2017 Wis. Act 185, to allow counties to establish secured residential care centers for children and youth. In 2019, the legislature further amended Wis. Stat. § 938.34(4m) specifically to permit the juvenile court to order placement of a juvenile under the supervision of the county department in a secured residential care center for children and youth identified by a county department. 2019 Wis. Act 8. As of the date that all juveniles are transferred from Lincoln Hills, the only permitted correctional placement of a juvenile under [Wis. Stat.](#) § 938.34(4m) will be to such a county-supervised facility.

Although these legislative acts in 2018 and 2019 provided specific deadlines that passed without the construction of a new facility and without the closure of the Lincoln Hills facility, the legislature, in 2022, finally authorized the state to contract additional public debt for the purpose of funding a new secured residential care center for children and youth in Milwaukee County. 2021 Wis. Act 252. After the construction of a new facility, the vacated juvenile facilities at Lincoln Hills and Copper Lake will be converted to adult facilities. *Id.*

At disposition, the juvenile court judge can order a child to be placed in a juvenile correctional facility—i.e., a correctional institution operated by or under contract to the Department of Corrections or operated by the Department of Health Services specifically for juveniles adjudged delinquent. [Wis. Stat.](#) § 938.02(10p). A juvenile can be placed in a juvenile correctional facility or secured residential care center for children and youth under the supervision of the Department of Corrections. [Wis. Stat.](#) § 938.34(4m).

### III. Criteria for Taking Child or Expectant Mother into Custody [§ 5.5]

#### A. Who Can Take Child or Expectant Mother into Custody [§ 5.6]

Law enforcement officers have the authority to take a child or expectant mother into custody, provided that the criteria discussed below are met. Intake workers and dispositional staff, see [Wis. Stat.](#) §§ 48.067, 48.069, 938.067, 938.069, have the power of law enforcement officers to take a child into custody if the child comes voluntarily, suffers from illness or injury, or faces immediate danger necessitating removal from the child’s surroundings. [Wis. Stat.](#) §§ 48.08(2), 938.08(2). Intake workers and dispositional staff may take an expectant mother into custody if she comes voluntarily or if there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered because of the expectant mother’s habitual lack of self-control in the use of alcohol or drugs. [Wis. Stat.](#) § 48.08(3). Personnel of the Department of Corrections (or a specified designee) can take a juvenile into custody if in “prompt pursuit” of one who has run away from a juvenile correctional facility or residential care center for children and youth or if the juvenile has failed to return from a furlough. [Wis. Stat.](#) § 938.08(3)(a). A juvenile taken into custody under this provision can be returned directly to the juvenile correctional facility or residential care center for children and youth and must have a disciplinary hearing in accordance with [Wis. Stat.](#) ch. 227. [Wis. Stat.](#) § 938.08(3)(b). In addition, a law enforcement officer, emergency medical services practitioner, or hospital staff member can take a child into custody if it is reasonable to believe that the child is 72 hours old or younger and if the parent relinquishes custody with no intent to return for the child. [Wis. Stat.](#) § 48.195.



Persons authorized to take a child or an expectant mother into custody must take care to do so properly. Properly taking a child into custody (that is, satisfying the statutory criteria) takes on particular significance in delinquency cases because an improper taking of a juvenile into custody, like an illegal arrest in adult criminal cases, can provide the legal basis for challenging any confessions made while the juvenile was in custody. [Wis. Stat.](#) §§ 938.19(3), 938.297(4); *State v. J.F.F. (In the Int. of J.F.F.)*, 164 Wis. 2d 10, 473 N.W.2d 546 (Ct. App. 1991); see also [Wis. Stat.](#) §§ 48.19(3), 48.297(4). Note that even after the legislature created [Wis. Stat.](#) ch. 938, the language of [Wis. Stat.](#) §§ 48.19(3) and 48.297(4) was not modified even though those sections no longer apply to delinquency cases. See *infra* § 5.48 (custodial interrogation), ch. 9 (discovery and other motion practice).

The criteria for taking a child or expectant mother into custody appear in [Wis. Stat.](#) §§ 48.19, 48.193, and 938.19 and are discussed in sections [5.7–5.10](#), *infra*.

## B. Court Order or Violation of Court Order [§ 5.7]

A child or an adult expectant mother can be taken into custody under a warrant or *capias*. [Wis. Stat.](#) §§ 48.19(1)(a), (b), 48.28, 48.193(1)(a), (b), 938.19(1)(a), (b), 938.28. Absent a court order, a law enforcement officer can take a child or adult expectant mother into custody if the officer has reason to believe that a court in this state or another state has issued a warrant or *capias* for the child's or adult expectant mother's apprehension, or if the officer believes the child to be a fugitive from justice. [Wis. Stat.](#) §§ 48.19(1)(d)1., 2., 48.193(1)(d)1., 938.19(1)(d)1., 2.

A law enforcement officer can also take a child or an adult expectant mother into custody if the officer has reasonable grounds to believe that the child or adult expectant mother has violated conditions of a custody order. [Wis. Stat.](#) §§ 48.19(1)(d)7., 48.193(1)(d)3., 938.19(1)(d)7.; see also *infra* § 5.38 (custody orders). A law enforcement officer can also take a juvenile into custody if the officer has reasonable grounds to believe that the juvenile has violated a condition of court-ordered supervision, community supervision, or aftercare supervision; placement in a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth; or participation in the intensive supervision program under [Wis. Stat.](#) § 938.534. [Wis. Stat.](#) § 938.19(1)(d)6.

## C. Reasonable Grounds and Probable Cause [§ 5.8]

A law enforcement officer can take a juvenile into custody if the officer has reasonable grounds to believe that the juvenile is committing or has committed a crime, a violation of civil law, or an ordinance violation punishable by forfeiture. [Wis. Stat.](#) § 938.19(1)(d)3., 8. Reasonable grounds equate with probable cause, defined as “that quantum of evidence which would lead a reasonable police officer to believe that the [juvenile] probably committed a crime” or civil violation. *State v. Woods*, 117 Wis. 2d 701, 710, 345 N.W.2d 457 (1984).

Juveniles who have committed an ordinance violation not punishable by forfeiture cannot be taken into custody. *State v. J.F.F. (In the Int. of J.F.F.)*, 164 Wis. 2d 10, 473 N.W.2d 546 (Ct. App. 1991). Unlike [Wis. Stat.](#) § 938.19(1)(d), [Wis. Stat.](#) § 48.19(1)(d) does not authorize custody for a child committing an ordinance violation punishable by forfeiture.

## D. Welfare of Child or Unborn Child [§ 5.9]

A child or an expectant mother may be taken into custody for reasons relating to the welfare of the child, the expectant mother, or the unborn child. A court can order a child taken into custody if the child's welfare demands immediate removal from the present placement. [Wis. Stat.](#) §§ 48.19(1)(c), 938.19(1)(c). A judge can order an expectant mother taken into custody if there is a showing that (1) because of the expectant's mother habitual lack of self-control in the use of alcohol or drugs, exhibited to a severe degree, there is a substantial risk that the physical health of the unborn child will be seriously affected or endangered unless the expectant mother is taken into custody; and (2) the expectant mother is refusing or has refused to accept alcohol or drug abuse services offered to her or is not making a good-faith effort to participate in such services. [Wis. Stat.](#) §§ 48.19(1)(cm), 48.193(1)(c).

A law enforcement officer can take a child into custody if the officer has reasonable grounds to believe that the child has run away, [Wis. Stat.](#) §§ 48.19(1)(d)4., 938.19(1)(d)4., suffers from illness or injury, [Wis. Stat.](#) §§ 48.19(1)(d)5., 938.19(1)(d)5., or faces immediate danger necessitating removal from the child's surroundings, [Wis. Stat.](#) §§ 48.19(1)(d)5., 938.19(1)(d)5. A law enforcement officer can take an expectant mother into custody if the officer has reasonable grounds to believe that there is a substantial risk that the physical health of the unborn child will be seriously affected or endangered because of the expectant mother's habitual lack of self-control in the use of alcohol or drugs, exhibited to a severe degree, unless the expectant mother is taken into custody. [Wis. Stat.](#) §§ 48.19(1)(d)8., 48.193(1)(d)2.

## E. Truancy [§ 5.10]



A law enforcement officer can take a child into custody if the officer has reasonable grounds to believe that the child is absent from school without an acceptable excuse under [Wis. Stat. § 118.15](#). [Wis. Stat. § 938.19\(1\)\(d\)10](#). An individual designated under [Wis. Stat. § 118.16\(2m\)\(a\)](#) may take a juvenile into custody if the juvenile is absent from school without an acceptable excuse under [Wis. Stat. § 118.15](#) and the school attendance officer or the juvenile's parent, guardian, or legal custodian requests that the juvenile be taken into custody. [Wis. Stat. § 938.19\(1m\)](#).

#### IV. [Release or Delivery from Custody](#)

##### [§ 5.11]

Under both the Children's Code and the Juvenile Justice Code, the person taking a child into custody must make every effort to release the child immediately to the child's parent, guardian, legal custodian, or Indian custodian. [Wis. Stat. §§ 48.20\(2\)\(ag\), 938.20\(2\)\(ag\)](#). If the parent, guardian, legal custodian, or Indian custodian is unavailable, unwilling, or unable to provide supervision for the child, the child can be released to a responsible adult or, if the child is 15 years old or older, released without immediate adult supervision. [Wis. Stat. §§ 48.20\(2\)\(b\), \(c\), 938.20\(2\)\(b\), \(c\)](#). A child considered to be a runaway can be released to a runaway home under [Wis. Stat. § 48.227](#). [Wis. Stat. §§ 48.20\(2\)\(d\), 938.20\(2\)\(d\)](#).

A person taking an adult expectant mother into custody must make every effort to release her to an adult relative or friend after counseling or warning. [Wis. Stat. § 48.203\(1\)](#). If an adult relative or friend is unavailable, unwilling, or unable to accept release of the expectant mother, the expectant mother can be released under her own supervision. *Id.*

If a delinquent juvenile has violated a condition of community supervision or aftercare supervision, a condition of placement in a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth, or a condition of participation in the intensive supervision program under [Wis. Stat. § 938.534](#), the person who took the juvenile into custody can release the juvenile to the Department of Corrections or to the county department, whichever has supervision over the juvenile. [Wis. Stat. § 938.20\(7\)\(c\)1m](#). [Wis. Stat. § 938.02\(2g\)](#) defines a *county department* as "a county department under [[Wis. Stat. §](#)] 46.215, 46.22 or 46.23, unless the context requires otherwise."

If a juvenile is absent from school without an acceptable excuse under [Wis. Stat. § 118.15](#), and a law enforcement officer takes the juvenile into custody, [Wis. Stat. § 938.19\(1\)\(d\)10](#), the officer can either release the juvenile under [Wis. Stat. § 938.20\(2\)\(ag\)](#) or (b) (as noted above) or deliver the juvenile to a youth service center under [Wis. Stat. § 118.16\(4\)\(e\)](#). [Wis. Stat. § 938.20\(2\)\(e\)](#); *see* [Wis. Stat. § 118.16\(4\)\(e\)](#) (providing that a school board "may establish one or more youth service centers for the counseling of children who are taken into custody ... for being absent from school without an acceptable excuse under [[Wis. Stat. §](#)] 118.15"). Personnel of the youth service center can then release the juvenile to the juvenile's parent, guardian, legal custodian, or school, after any appropriate counseling. [Wis. Stat. § 938.20\(2\)\(e\)](#). If the juvenile is released to the school, the school must immediately notify the juvenile's parent, guardian, or legal custodian. *Id.*

If a law enforcement officer has taken a juvenile into custody under [Wis. Stat. § 938.19\(1m\)](#), pursuant to the request of a school attendance officer designated by [Wis. Stat. § 118.16\(2m\)\(a\)](#), the officer can release the juvenile under [Wis. Stat. § 938.20\(2\)\(ag\), \(b\), or \(c\)](#), as noted above, or to the juvenile's school administrator. [Wis. Stat. § 938.20\(2\)\(f\)](#); *see* [Wis. Stat. § 125.09\(2\)\(a\)3](#). (defining *school administrator* as "the person designated by the governing body of a school as ultimately responsible for the ordinary operations of a school"). Under [Wis. Stat. § 938.20\(2\)\(f\)](#), a school employee can act as designee of a school administrator.

The school administrator or designee must (1) immediately notify the juvenile's parent, guardian, or legal custodian, [Wis. Stat. § 938.20\(2\)\(f\)1.](#); (2) determine whether the juvenile is at risk under [Wis. Stat. § 118.153\(1\)\(a\)](#) (unless that determination has already been made during the current school semester), [Wis. Stat. § 938.20\(2\)\(f\)2.](#); and (3) provide the juvenile and the juvenile's parent or guardian with the opportunity for educational counseling to determine whether a change in the juvenile's program or curriculum, including any modifications under [Wis. Stat. § 118.15\(1\)\(d\)](#), would resolve the juvenile's truancy problems, unless the juvenile and the parent have already had an opportunity for educational counseling during the current school semester, [Wis. Stat. § 938.20\(2\)\(f\)3](#).

For a juvenile taken into custody under [Wis. Stat. § 938.19\(1\)\(d\)10](#). or (1m) (for absence from school without an acceptable excuse) but not released as noted above, the person who took the juvenile into custody must, after counseling or warning the juvenile (whichever appears appropriate), release the juvenile without immediate adult supervision. [Wis. Stat. § 938.20\(2\)\(g\)](#).

Under both [Wis. Stat. ch. 48](#) and [Wis. Stat. ch. 938](#), a child or expectant mother taken into custody and not released has a right to an interview by an intake worker, who must determine whether the child or expectant mother should continue in custody and, if so, where. [Wis. Stat. §§ 48.20\(3\), 48.203\(2\), 938.20\(3\)](#); *see also infra* §§ [5.12–.16](#) (criteria for intake worker's decision to keep child or expectant mother in custody), [ch. 6](#) (intake inquiry). The intake worker must make a written statement containing reasons for taking the child or expectant mother into custody. Under [Wis. Stat. ch. 48](#), any child 12 years old or older or an adult expectant mother has a right to a copy of

this statement. [Wis. Stat.](#) §§ 48.20(3), 48.203(2). Under [Wis. Stat.](#) ch. 938, the intake worker must give any child 10 years old or older a copy of the statement. [Wis. Stat.](#) § 938.20(3).

Under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, an intake worker can release a child (1) to a parent, guardian, legal custodian, or Indian custodian, [Wis. Stat.](#) §§ 48.20(7)(c)1., 938.20(7)(c)1.; (2) to another responsible adult (with the intake worker counseling or warning the child, whichever appears appropriate), if the parent, guardian, legal custodian, or Indian custodian is unavailable, unwilling, or unable to provide supervision of the child, [Wis. Stat.](#) §§ 48.20(7)(c)1., 938.20(7)(c)1.; (3) without immediate supervision, if the child is 15 years old or older (with the intake worker counseling or warning, as appropriate), [Wis. Stat.](#) §§ 48.20(7)(c)1., 938.20(7)(c)1.; (4) to the Department of Corrections or a county department, if the juvenile has violated a condition of community supervision or aftercare supervision, a condition of placement in a Type 2 juvenile correctional facility or Type 2 residential care center for children and youth, or a condition of participation in the intensive supervision program under [Wis. Stat.](#) § 938.534, [Wis. Stat.](#) § 938.20(7)(c)1m.; or (5) if the child is a runaway, to a runaway home, [Wis. Stat.](#) §§ 48.20(7)(c)2., 938.20(7)(c)2.

The intake worker can release an adult expectant mother to an adult relative or friend after counseling or warning. If an adult relative or friend is unavailable, unwilling, or unavailable, the adult expectant mother may be released under her own supervision. [Wis. Stat.](#) § 48.203(6)(c).

If a child is believed to be suffering from a serious physical condition requiring prompt diagnosis or treatment, the intake worker or person who took the child into custody should take the child to either a hospital (as defined in [Wis. Stat.](#) § 50.33(2)(a) or (c)) or a physician's office. [Wis. Stat.](#) §§ 48.20(4), 938.20(4). If the child is believed to be mentally ill, drug dependent, or developmentally disabled, and if the standards for involuntary commitment under [Wis. Stat.](#) § 51.15 are met, the person taking the child into custody or the intake worker must proceed under [Wis. Stat.](#) § 51.15. [Wis. Stat.](#) §§ 48.20(5), 938.20(5).

**Note.** While [Wis. Stat.](#) § 51.15(1) requires as a basis for emergency detention evidence of a substantial probability of physical impairment or injury to self or other individuals because of impaired judgment, as manifested by evidence of a recent act or omission, [Wis. Stat.](#) §§ 48.20(5) and 938.20(5) require a *very* substantial probability of physical impairment or injury to the child when the child's impaired judgment is the cause.

Similarly, the person taking the child into custody or the intake worker must proceed under the civil commitment provisions in [Wis. Stat.](#) § 51.45(11) (treatment and services for intoxicated persons and others incapacitated by alcohol or another drug) if a child (1) is incapacitated by alcohol or another drug; or (2) is believed to be an intoxicated person who has threatened, attempted, or inflicted physical harm on the child's self or another person and is believed to be likely to inflict harm unless committed. [Wis. Stat.](#) §§ 48.20(6), 938.20(6).

If an unborn child or expectant mother is believed to be suffering from a serious physical condition requiring prompt diagnosis or treatment, the intake worker or person who took the expectant mother into custody should take the expectant mother to either a hospital or a physician's office. [Wis. Stat.](#) §§ 48.20(4m), 48.203(3). If the expectant mother is believed to be mentally ill, drug dependent, or developmentally disabled, and if the standards for involuntary commitment under [Wis. Stat.](#) § 51.15 are met, the person taking the expectant mother into custody or the intake worker must proceed under [Wis. Stat.](#) § 51.15. [Wis. Stat.](#) §§ 48.20(5), 48.203(4).

**Note.** Under [Wis. Stat.](#) § 48.20(5), the child expectant mother must exhibit conduct that constitutes a substantial probability of physical harm to herself or to others, or a *very* substantial probability of physical impairment or injury to the child expectant mother must exist because of her impaired judgment. Under [Wis. Stat.](#) § 48.203(4), the adult expectant mother must exhibit conduct that constitutes a substantial probability of physical harm to herself or to others, or a substantial probability of physical impairment or injury to the adult expectant mother must exist because of her impaired judgment.

Similarly, the person taking the expectant mother into custody or the intake worker must proceed under [Wis. Stat.](#) § 51.45(11) if the expectant mother (1) is incapacitated by alcohol or another drug; or (2) is believed to be an intoxicated person who has threatened, attempted, or inflicted physical harm on herself or another and is believed to be likely to inflict harm unless committed. [Wis. Stat.](#) §§ 48.20(6), 48.203(5).

## V. Criteria for Keeping Child or Expectant Mother in Custody [§ 5.12]

### A. In General [§ 5.13]

The intake worker's decision to hold a child or an expectant mother in custody must satisfy the criteria specified in [Wis. Stat.](#) § 48.205 or [Wis. Stat.](#) § 938.205, as well as the criteria promulgated under [Wis. Stat.](#) § 48.06(1) or (2) or [Wis. Stat.](#) § 938.06(1) or (2). (Under [Wis. Stat.](#)

§§ 48.06 and 938.06, each county must promulgate rules for intake.) The custody decision involves two determinations: (1) whether to hold the child or expectant mother in physical custody at all; and (2) in the case of a child, whether to hold the child in secure or nonsecure custody.

## B. Holding Child or Expectant Mother in Physical Custody [§ 5.14]

Under both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, a child can be held in secure or nonsecure custody if the intake worker has probable cause to believe that the child is within the jurisdiction of the court, *see supra* [ch. 4](#) (jurisdiction and venue), and (depending on whether the child is alleged to be CHIPS, JIPS, or delinquent) has probable cause to believe that one of the following will occur:

1. Under [Wis. Stat.](#) ch. 48, the child, if not held, will cause injury to self-harm or suffer injury from others. [Wis. Stat.](#) § 48.205(1)(a), (am) (whether a child is “subject to injury by others” may be based on a determination that if another child in the home is not held that child will be subject to injury by others).
2. Under [Wis. Stat.](#) ch. 938, the juvenile, if not held, will commit injury to the person or property of another. [Wis. Stat.](#) § 938.205(1)(a).
3. The parent, guardian, or legal custodian of the child, or another responsible adult, is neglecting, refusing, unable, or unavailable to provide adequate supervision and care, and the services that would ensure the child’s safety and well-being are inadequate or not available. [Wis. Stat.](#) §§ 48.205(1)(b), 938.205(1)(b); *see also* [Wis. Stat.](#) § 48.205(1)(bm) (providing that a child may be held in custody if another child in the house meets the criteria specified in [Wis. Stat.](#) § 48.205(1)(b)).
4. The child will run away or be taken away so as to be unavailable for proceedings of the court or its officers or, under [Wis. Stat.](#) ch. 938, revocation hearings and appeals. [Wis. Stat.](#) §§ 48.205(1)(c), 938.205(1)(c).

Under [Wis. Stat.](#) ch. 48, an expectant mother can be held in nonsecure custody if the intake worker has probable cause to believe that the expectant mother is within the jurisdiction of the court under [Wis. Stat.](#) § 48.133. [Wis. Stat.](#) § 48.205(1), (1m). Additionally, the intake worker must have probable cause to believe that there is a substantial risk that the physical health of the unborn child will be seriously affected or endangered by the expectant mother’s habitual lack of self-control in the use of alcohol or drugs, exhibited to a severe degree, and that the expectant mother is refusing or has refused to accept alcohol or drug abuse services offered to her or is not making a good-faith effort to participate in such services. [Wis. Stat.](#) § 48.205(1)(d), (1m).

## C. Holding Child in Juvenile Detention Facility [§ 5.15]

Under [Wis. Stat.](#) §§ 48.208 and 938.208, the intake worker cannot order a child held in juvenile detention except under one of the following conditions:

1. Probable cause exists to believe that the juvenile has committed a delinquent act and presents a substantial risk of physical harm to another or a substantial risk of running away so as to be unavailable for a court proceeding or revocation hearing. [Wis. Stat.](#) § 938.208(1). Under this section, for those juveniles who have been adjudged delinquent, the delinquent act may be the act for which the juvenile was adjudged delinquent. The juvenile satisfies the criterion of presenting a substantial risk of physical harm to another person if the intake worker determines that probable cause exists to believe that the juvenile has (a) committed a delinquent act that would be a felony if committed by an adult, [Wis. Stat.](#) § 938.208(1)(a); (b) committed a delinquent act that would qualify as a felony under [Wis. Stat.](#) ch. 940 if committed by an adult, while possessing, using, or threatening use of a handgun as defined under [Wis. Stat.](#) § 175.35(1)(b), a short-barreled rifle as defined under [Wis. Stat.](#) § 941.28(1)(b), or a short-barreled shotgun, under [Wis. Stat.](#) § 941.28(1)(c), [Wis. Stat.](#) § 938.208(1)(b); or (c) possessed or gone armed with a short-barreled rifle, short-barreled shotgun, or handgun in violation of [Wis. Stat.](#) § 941.28 or [Wis. Stat.](#) § 948.60, [Wis. Stat.](#) § 938.208(1)(c).

**Note.** Felonies listed under [Wis. Stat.](#) § 938.208(1)(a) include first-degree intentional homicide under [Wis. Stat.](#) § 940.01; first-degree reckless homicide under [Wis. Stat.](#) § 940.02; felony murder under [Wis. Stat.](#) § 940.03; second-degree intentional homicide under [Wis. Stat.](#) § 940.05; aggravated battery under [Wis. Stat.](#) § 940.19(2)–(6); physical abuse of an elder person under [Wis. Stat.](#) § 940.198; mayhem under [Wis. Stat.](#) § 940.21; first-degree sexual assault under [Wis. Stat.](#) § 940.225(1); kidnapping under [Wis. Stat.](#) § 940.31; endangering safety by use of a dangerous weapon under [Wis. Stat.](#) § 941.20(3); arson under [Wis. Stat.](#) § 943.02(1); carjacking under [Wis. Stat.](#) § 943.23(1g); armed robbery under [Wis. Stat.](#) § 943.32(2); harassment under [Wis. Stat.](#) § 947.013(1t), (1v), or (1x); first-degree sexual assault of a child under [Wis. Stat.](#) § 948.02(1); second-degree sexual assault of a child under [Wis. Stat.](#) § 948.02(2);

repeated sexual assault of the same child under [Wis. Stat. § 948.025](#); physical abuse of a child under [Wis. Stat. § 948.03](#); and sexual assault of a child placed in substitute care under [Wis. Stat. § 948.085\(2\)](#).

2. Probable cause exists to believe that the juvenile fled as a fugitive from another state or ran away from a juvenile correctional facility or secured residential care center for children and youth, and a reasonable opportunity to return the juvenile has not yet arisen. [Wis. Stat. § 938.208\(2\)](#).
3. The child consents in writing to remaining in custody to secure protection from imminent physical threat from another person, and the court directs secure placement through a protective order. [Wis. Stat. §§ 48.208\(3\), 938.208\(3\)](#).
4. Probable cause exists to believe that a child ordered by the court to be held in nonsecure custody by an intake worker or by the court's detention order under [Wis. Stat. § 48.21\(4\)](#) or [Wis. Stat. § 938.21\(4\)](#) has run away or committed a delinquent act, and no other suitable alternative to secure detention exists. [Wis. Stat. §§ 48.208\(4\), 938.208\(4\)](#).
5. Probable cause exists to believe that the juvenile has been alleged or adjudged delinquent, has run away from another county, and would run away from nonsecure custody pending return to that county. [Wis. Stat. § 938.208\(5\)](#). Under this section, a juvenile can be held in secure detention not longer than 24 hours—plus, if ordered by the court for good cause, one 24-hour extension.
6. Probable cause exists to believe that the juvenile is subject to the jurisdiction of the adult court under [Wis. Stat. § 938.183\(1\)](#) and is under 15 years of age. [Wis. Stat. § 938.208\(6\)](#).

#### **D. Holding Child in County Jail or Municipal Lockup Facility [§ 5.16]**

A court can order a child into secure custody in a county jail only if the child meets the criteria of [Wis. Stat. § 48.208](#) or [Wis. Stat. § 938.208](#), the jail meets the physical requirements of [Wis. Stat. § 48.209\(1\)](#) or [Wis. Stat. § 938.209\(1\)](#), and either of two additional factors exist: (1) another juvenile detention facility is not available; or (2) as evidenced by a previous act or attempt, the child presents a substantial risk of physical harm to others in the juvenile detention facility, a risk avoidable only by transferring the child to the jail. [Wis. Stat. §§ 48.209\(1\), \(2\), 938.209\(1\)](#). Under [Wis. Stat. §§ 48.209\(1\) and 938.209\(1\)\(a\)](#), the jail must meet standards established by the Department of Corrections, the child must stay in a room separated from the adults but not in a cell designed for segregation of adults, adequate supervision must be provided, and the court must review the status of the child every three days.

A juvenile waived into adult court or under the jurisdiction of adult court under [Wis. Stat. § 938.18](#) can be held in a county jail without the restrictions provided by [Wis. Stat. § 938.209\(1\)](#). [Wis. Stat. § 938.209\(3\)](#). An exception to this rule exists if the juvenile is 15 years old or younger and is under the original exclusive jurisdiction of adult court under [Wis. Stat. § 938.183\(1\)](#).

A juvenile who is alleged to have committed a delinquent act can be held in a municipal lockup facility if the following criteria are all met:

1. The Department of Corrections has approved the facility as suitable for holding juveniles.
2. The juvenile is held for not more than six hours while waiting for a detention hearing.
3. There is sight and sound separation between the juvenile and any adults held in the facility.
4. The juvenile is held for investigative purposes only.

[Wis. Stat. § 938.209\(2m\)\(a\)1.–4.](#)

Under [Wis. Stat. § 938.209\(2m\)\(b\)](#), the Department of Corrections must promulgate rules establishing the minimum requirements for the approval of municipal lockup facilities as suitable for holding juveniles. See [Wis. Admin. Code § DOC 349.21](#). The rules must be designed to protect the health, safety, and welfare of the juveniles held in such facilities.

#### **VI. Notice [§ 5.17]**

The person taking a child or child expectant mother into custody must immediately attempt to notify the parent, guardian, legal custodian, and Indian custodian. [Wis. Stat. §§ 48.19\(2\), 938.19\(2\)](#). The person taking an adult expectant mother into custody must attempt to notify an adult relative or friend of the adult expectant mother. [Wis. Stat. § 48.193\(2\)](#). In both situations, notification attempts must



continue until contact is made or until delivery of the child or expectant mother to the intake worker, whichever occurs first. [Wis. Stat.](#) §§ 48.19(2), 48.193(2), 938.19(2). Even after delivery of the child or expectant mother to an intake worker, the worker must continue attempting to notify the parent, guardian, legal custodian, or Indian custodian, or the adult relative or friend until one of them receives notice. [Wis. Stat.](#) §§ 48.19(2), 48.193(2), 938.19(2). If the child is released, the person must immediately notify the parent, guardian, legal custodian, or Indian custodian of the time and circumstances of the release and of the identity of the person to whom the child was released. [Wis. Stat.](#) §§ 48.20(3), (7)(d), 938.20(3), (7)(d).

The person taking a child or expectant mother into custody must write a statement containing facts supporting the reasons for taking the child or expectant mother into physical custody. [Wis. Stat.](#) §§ 48.20(3), 48.203(2), 938.20(3). The intake worker must receive a copy of this statement or, if the intake worker did not conduct the intake interview in person, the statement can be read to the intake worker. Under [Wis. Stat.](#) ch. 48, children 12 years old or older and adult expectant mothers who continue in custody must receive a copy of this statement. [Wis. Stat.](#) §§ 48.20(3), 48.203(2). Under [Wis. Stat.](#) ch. 938, juveniles 10 years old or older who continue in custody must receive a copy of the statement. [Wis. Stat.](#) § 938.20(3).

The intake worker must advise any juvenile possibly involved in a delinquent act who continues in custody of the right to counsel and right against self-incrimination. [Wis. Stat.](#) § 938.20(7)(a). Children 12 years old or older alleged to be in need of protection or services, as well as adult expectant mothers, must be advised of their right to counsel. [Wis. Stat.](#) §§ 48.20(7)(a), 48.203(6)(a); *see also supra* [ch. 2](#) (rights of children and parents). If a child continues in custody, the intake worker must notify the parent, guardian, legal custodian, and Indian custodian of the reasons for holding the child in custody and of the child's whereabouts, unless notice would present imminent danger to the child. [Wis. Stat.](#) §§ 48.20(8), 938.20(8). See [Wis. Stat.](#) §§ 48.23 and 938.23 for the scope of the statutory right to counsel. If the child is an expectant mother, the child as well as the unborn child's guardian ad litem must receive notice of the reasons why the child expectant mother is continuing to be held in custody. [Wis. Stat.](#) § 48.20(8). If an adult expectant mother remains in custody, the intake worker must notify the expectant mother and the unborn child's guardian ad litem of the reasons for holding the expectant mother in custody, the time and place of the detention hearing required under [Wis. Stat.](#) § 48.213, the nature and possible consequences of that hearing, and the right to present and cross-examine witnesses at the hearing. [Wis. Stat.](#) § 48.203(7). If a juvenile is held in custody after violating a condition of community supervision or aftercare, a condition of placement in a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth, or a condition of the juvenile's participation in the intensive supervision program under [Wis. Stat.](#) § 938.534, the intake worker must also notify the Department of Corrections or county department, whichever has supervision over the juvenile, of the reasons for holding the juvenile in custody, of the juvenile's location, and of the time and place of the detention hearing. [Wis. Stat.](#) § 938.20(8).

Parents and children 12 years old or older, as well as expectant mothers and the guardians ad litem of the unborn children, must receive notice of the time and place for the detention hearing, the nature and possible consequences of the hearing, and the right to present and cross-examine witnesses at the hearing. [Wis. Stat.](#) §§ 48.20(8), 48.203(7), 938.20(8). Notice must also be given of the right to counsel under [Wis. Stat.](#) § 48.23 and, in the case of a parent or Indian custodian of an Indian child who is the subject of an Indian child custody proceeding, the right to counsel under [Wis. Stat.](#) § 48.028(4)(b) or 938.028(4)(b). [Wis. Stat.](#) §§ 48.20(8)(a), 938.20(8)(a). If the parent, guardian, legal custodian, or Indian custodian is not immediately available, the intake worker or other person designated by the court must provide notice as soon as possible. [Wis. Stat.](#) §§ 48.20(8), 938.20(8).

## VII. Detention Hearing [§ 5.18]

### A. Overview [§ 5.19]

The detention hearing—a critical stage of the proceedings—is the first stage at which the statutory right to counsel attaches. *State v. Woods*, 117 Wis. 2d 701, 736–38, 345 N.W.2d 457 (1984). In a delinquency case, the juvenile's constitutional right to counsel attaches at the filing of the petition. See generally [chapter 2](#), *supra*, for a discussion of the rights of children in juvenile court proceedings.

### B. Procedure [§ 5.20]

#### 1. In General [§ 5.21]

[Wis. Stat.](#) §§ 48.21, 48.213, and 938.21 govern the procedures at detention hearings. In delinquency and JIPS cases, a detention hearing must take place within 24 hours after the end of the day that the decision was made to hold the juvenile, excluding Saturdays, Sundays, and legal holidays. [Wis. Stat.](#) § 938.21(1)(a). In CHIPS and UCHIPS cases, a detention hearing must be held within 48 hours after the decision to hold the child or expectant mother, excluding Saturdays, Sundays, and legal holidays. [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a).

**Comment.** In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the U.S. Supreme Court held that the Fourth Amendment requires that an individual arrested without a warrant appear before a neutral magistrate for a judicial determination of probable cause within 48 hours after arrest. In *State v. Koch*, 175 Wis. 2d 684, 499 N.W.2d 152 (1993), the Wisconsin Supreme Court held that the judicial determination of probable cause can rest solely on hearsay and written testimony and can be made without the presence of the confined individual. This 48-hour period includes Saturdays, Sundays, and holidays. Taking and holding a juvenile in secure custody pursuant to a state statute constitutes an arrest within the Fourth Amendment and requires a determination of probable cause pursuant to *Riverside*. *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on other grounds*, 442 F.2d 29 (7th Cir. 1971). Children held over the weekend might, therefore, have a right to a *Riverside* hearing.

Under *Riverside*, a violation of the 48-hour rule triggers a requirement that the state demonstrate the existence of a bona fide emergency or other extraordinary circumstances justifying the delay. *County of Riverside*, 500 U.S. at 57. If a *Riverside* violation occurs, suppression of any evidence obtained because of the violation can serve as one remedy. *Koch*, 175 Wis. 2d at 698–99.

These statutory time periods do not apply if the parent, guardian, legal custodian, Indian custodian, child, or expectant mother has waived the right to a hearing under [Wis. Stat.](#) § 48.21(3)(am), 48.213(2)(b), or 938.21(2)(am) or (3)(am). If a hearing does not take place within the time period, the child or expectant mother must be released from custody. [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a). Therefore, defense counsel should determine whether a violation of the statutory time period has occurred and, if so, prepare to argue for release at the detention hearing.

At a detention hearing, the state or county has the burden of demonstrating “probable cause to believe that the child [or expectant mother] is within the jurisdiction of the court” (that is, probable cause that the child is delinquent or needs protection or services or that the unborn child needs protection or services) and that the state or county has satisfied the criteria in support of the level of custody requested. [Wis. Stat.](#) §§ 48.205(1), 938.205(1).

Generally, the filing of a petition under [Wis. Stat.](#) § 48.25 or [Wis. Stat.](#) § 938.25 must occur by the time of the detention hearing, [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a), and the parent, guardian, legal custodian, Indian custodian, and the child, the expectant mother, and the unborn child’s guardian ad litem must receive a copy of the petition at or before the hearing. [Wis. Stat.](#) §§ 48.21(3)(b), 48.213(2)(c), 938.21(2)(b), (3)(b). In CHIPS, UCHIPS, and JIPS cases, this requirement applies only to children 12 years old or older. A written statement explaining why the child or expectant mother was taken into custody will suffice if (1) the child was taken into custody as a runaway from another state, [Wis. Stat.](#) §§ 48.21(1)(a), 938.21(1)(a); (2) the child or expectant mother was taken into custody pursuant to a capias, [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a); *see also* [Wis. Stat.](#) §§ 48.19(1)(b), 48.193(1)(b), 938.19(1)(b); or (3) the child or expectant mother was taken into custody by a law enforcement officer who believed on reasonable grounds that another state had issued a capias or warrant for the child or expectant mother, [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a); *see also* [Wis. Stat.](#) §§ 48.19(1)(d)2., 48.193(1)(d)1., 938.19(1)(d)2., that the child (juvenile) had violated a condition of court-ordered supervision, placement in a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth, participation in the intensive supervision program, or community supervision or aftercare supervision, [Wis. Stat.](#) §§ 938.21(1)(a), 938.19(1)(d)6., or that the child or expectant mother had violated the conditions of the court’s custody order or an intake worker’s order for temporary physical custody. [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a); *see also* [Wis. Stat.](#) §§ 48.19(1)(d)7., 48.193(1)(d)3., 938.19(1)(d)7.

If the required petition or statement (or request, if a JIPS or delinquency matter) has not been filed by the time of the detention hearing, the child or expectant mother must be released. [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a). An exception arises when the court grants a one-time 48-hour extension in delinquency and JIPS cases to file a petition or request or a one-time 72-hour extension in CHIPS and UCHIPS cases to file a petition. The court can grant this extension after determining at the detention hearing that probable cause exists to believe that (1) additional time is required to determine whether the filing of a petition initiating proceedings under [Wis. Stat.](#) ch. 48 is necessary, [Wis. Stat.](#) § 48.21(1)(b); (2) the child poses an imminent danger to self or others; (3) the parent, guardian, legal custodian, or other responsible adult is neglecting, refusing, unable, or unavailable to provide adequate supervision and care, [Wis. Stat.](#) §§ 48.21(1)(b), 938.21(1)(b); or (4) there is a substantial risk that the physical health of the unborn child will be seriously affected or endangered by the expectant mother’s habitual lack of self-control in the use of alcohol or drugs, exhibited to a severe degree, and the expectant mother is refusing alcohol or drug abuse services offered to her or is not making a good-faith effort to participate in such services, [Wis. Stat.](#) §§ 48.21(1)(b), 48.213(1)(b). Note that (1) does not apply in JIPS or delinquency cases.

If the child is held in custody in a residential care center for children and youth, group home, or shelter care facility certified as a “qualified residential treatment program” under [Wis. Stat.](#) § 48.675, by the DCF, the “qualified individual” must conduct a standardized assessment, and the intake worker must submit it and the recommendation no later than the hearing, or no later than 30 days after the date on which the placement is made. The standardized assessment should include information about all of the following: (1) whether the proposed placement will provide the child with the most effective and appropriate level of care in the least restrictive environment; (2) how the placement is consistent with the short-term and long-term goals for the child, as specified in the permanency plan; (3) the reasons why the child’s needs cannot be met by the child’s family or in a foster home (a shortage or lack of foster homes is not an acceptable reason);

and (4) the placement preference of the family permanency team and, if that preference is not the placement recommended by the qualified individual, why that recommended placement is not preferred. [Wis. Stat.](#) §§ 48.21(1)(c), 938.21(1)(c); *see also* [Wis. Stat.](#) §§ 48.02(14k) (defining “qualified individual”), (17t) (defining “standardized assessment”), 938.02(14m), (17t).

The rules of evidence do not apply at detention hearings. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). Nevertheless, the court must “apply the basic principles of relevancy, materiality and probative value” in deciding whether to admit evidence on questions of fact. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). Consequently, the court must exclude irrelevant evidence, *see* [Wis. Stat.](#) § 904.02, evidence that will prove more prejudicial than probative, *see* [Wis. Stat.](#) § 904.03, repetitious evidence, *id.*, and evidence otherwise inadmissible under [Wis. Stat.](#) § 901.05. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). ([Wis. Stat.](#) § 901.05 governs the admissibility of tests to detect the presence of HIV.) The court cannot admit hearsay evidence lacking “demonstrable circumstantial guarantees of trustworthiness.” [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b).

After the hearing, the court can order the child or expectant mother released or continued in custody. [Wis. Stat.](#) §§ 48.21(4), 48.213(3), 938.21(4). If the court determines that entering a consent decree or ordering the petition dismissed and referred to the intake worker for informal disposition or deferred prosecution will advance the best interests of the child or unborn child and the public, the court can take those steps. [Wis. Stat.](#) §§ 48.21(7), 48.213(6), 938.21(7). See [chapters 6](#) (intake inquiry) and [8](#) (plea hearing), *infra*, for discussions of informal dispositions, consent decrees, and deferred prosecutions.

## 2. Juveniles Alleged to Be Delinquent or Not Responsible or Not Competent [§ 5.22]

### a. In General [§ 5.23]

[Wis. Stat.](#) § 938.21(2) governs detention hearings for any juvenile alleged to be delinquent under [Wis. Stat.](#) § 938.12 or alleged to be delinquent under [Wis. Stat.](#) § 938.13(12) but less than 10 years of age, or for a juvenile found not competent or not responsible for a delinquent act by reason of mental disease or defect.

### b. Appraisal of Rights [§ 5.24]

Before the [Wis. Stat.](#) § 938.21(2) hearing, the court must advise the juvenile of the following: (1) the allegations in the petition; (2) the nature and possible consequences of the detention hearing contrasted with those of possible future hearings; and (3) the provisions of [Wis. Stat.](#) § 938.18, which governs juvenile waiver. [Wis. Stat.](#) § 938.21(2)(c).

Thus, the court must advise the juvenile of the consequences that accompany the juvenile court proceedings, such as the potential outcomes of the detention hearing, the plea hearing, the fact-finding hearing, and disposition, as well as the possibility of waiver into adult court, if applicable.

The court must also advise the juvenile of (1) the right to counsel regardless of ability to pay, (2) the right to remain silent, (3) the right to confront and cross-examine witnesses, and (4) the right to present witnesses. *Id.*; *see also* [Wis. Stat.](#) §§ 938.23, 938.243(1); *supra* [ch. 2](#) (rights of parties).

### c. Waiver of Hearing [§ 5.25]

A juvenile held in nonsecure custody can waive in writing the right to a detention hearing. [Wis. Stat.](#) § 938.21(2)(am). Even if the juvenile executes a waiver, however, a detention hearing can take place if requested by the juvenile or any other interested party for good cause shown. *Id.* Any juvenile transferred from nonsecure custody to a juvenile detention facility, *see* [Wis. Stat.](#) § 938.208, must have a detention hearing. [Wis. Stat.](#) § 938.21(2)(am).

### d. Rehearing [§ 5.26]

A parent not present at the detention hearing has a right, on request for good cause shown, to a rehearing. [Wis. Stat.](#) § 938.21(1)(a). A juvenile who is not represented by counsel at the detention hearing and who continues in custody as a result of the hearing has a right to a rehearing on request through subsequently appointed counsel or through a guardian ad litem. [Wis. Stat.](#) § 938.21(2)(d). If a court commissioner makes the detention decision, the judge, on motion of “any party,” must review the decision. [Wis. Stat.](#) § 757.69(8). Any order to hold the juvenile in custody is subject to rehearing for good cause. [Wis. Stat.](#) § 938.21(2)(d).

## 3. Children or Unborn Children in Need of Protection or Services [§ 5.27]



### a. In General [§ 5.28]

[Wis. Stat.](#) §§ 48.21(3) and 48.213(2) govern detention hearings for a child or unborn child alleged to be in need of protection or services under [Wis. Stat.](#) § 48.13 or [Wis. Stat.](#) § 48.133.

### b. Appraisal of Rights [§ 5.29]

Before the hearing, the court must advise the parent, guardian, legal custodian, or Indian custodian, as well as the expectant mother and the unborn child's guardian ad litem, of the allegations already made or that might be made; the nature and possible consequences of the detention hearing as compared to possible future hearings; the right to counsel under [Wis. Stat.](#) § 48.23; the right to present, confront, and cross-examine witnesses; and, in the case of a parent or Indian custodian of an Indian child who is the subject of an Indian child custody proceeding, the right to counsel under [Wis. Stat.](#) § 48.028(4)(b). [Wis. Stat.](#) §§ 48.21(3)(d), 48.213(2)(d).

### c. Waiver of Hearing [§ 5.30]

The parent, guardian, legal custodian, or Indian custodian or the adult expectant mother can waive the detention hearing. [Wis. Stat.](#) §§ 48.21(3)(am), 48.213(2)(b). Even after a waiver, the court must hold a detention hearing if any interested party requests one. [Wis. Stat.](#) §§ 48.21(3)(am), 48.213(2)(b).

### d. Rehearing [§ 5.31]

A parent not present at the detention hearing has a right, on request for good cause shown, to a rehearing. [Wis. Stat.](#) § 48.21(1)(a). If not represented at the hearing and the child or expectant mother continues in custody as a result of the hearing, the parent, guardian, legal custodian, Indian custodian, child, or expectant mother can, through subsequently appointed counsel or through a guardian ad litem, request a rehearing. [Wis. Stat.](#) §§ 48.21(3)(e), 48.213(2)(e). If a court commissioner makes the detention decision, the judge, on motion of "any party," must review the decision. [Wis. Stat.](#) § 757.69(8). If there is good cause to do so, an order to hold the child in custody must be reheard. [Wis. Stat.](#) §§ 48.21(3)(e), 48.213(2)(e).

## 4. Juveniles in Need of Protection or Services [§ 5.32]

### a. In General [§ 5.33]

[Wis. Stat.](#) § 938.21(3) governs detention hearings for juveniles alleged to be in need of protection or services under [Wis. Stat.](#) § 938.13(4) because of uncontrollability; under [Wis. Stat.](#) § 938.13(6) or (6m) because of being habitually truant from school or being a school dropout; or under [Wis. Stat.](#) § 938.13(7) because of being "habitually truant from home" (i.e., a runaway).

### b. Appraisal of Rights [§ 5.34]

Before the [Wis. Stat.](#) § 938.21(3) hearing, the court must advise the parent, guardian, legal custodian, or Indian custodian of (1) the allegations in the petition, and (2) the nature and possible consequences of the detention hearing contrasted with those of possible future hearings. [Wis. Stat.](#) § 938.21(3)(d).

Thus, the court must advise the parent, guardian, legal custodian, or Indian custodian of the consequences that accompany the juvenile court proceedings, such as the potential outcomes of the detention hearing, the plea hearing, the fact-finding hearing, and disposition.

The court must also advise the parent, guardian, legal custodian, or Indian custodian of the rights to present, confront, and cross-examine witnesses; and, in the case of a parent or Indian custodian of an Indian juvenile who is the subject of an Indian juvenile custody proceeding, the right to counsel. *Id.*

### c. Waiver of Hearing [§ 5.35]

A parent, guardian, legal custodian, or Indian custodian can waive in writing the right to participate in a detention hearing. [Wis. Stat.](#) § 938.21(3)(am). Even if the parent, guardian, legal custodian, or Indian custodian executes a waiver, however, a detention hearing can take place if requested by the juvenile or any other interested party for good cause shown. *Id.*

## d. Rehearing [§ 5.36]

If a juvenile or the juvenile's parent, guardian, legal custodian, or Indian custodian is not represented by counsel at the detention hearing and the juvenile continues in custody as a result of the hearing, the juvenile, parent, guardian, legal custodian, or Indian custodian has a right to a rehearing on request through subsequently appointed counsel or through a guardian ad litem. [Wis. Stat. § 938.21\(3\)\(e\)](#). If a court commissioner makes the detention decision, the judge, on motion of any party, must review the decision. [Wis. Stat. § 757.69\(8\)](#). If there is good cause to do so, the order to hold the juvenile in custody must be reheard. [Wis. Stat. § 938.21\(3\)\(e\)](#).

## C. Role of Defense Counsel [§ 5.37]

Defense counsel should prepare to argue that probable cause does not exist to believe that the juvenile court has jurisdiction over the child or unborn child. The parent's, child's, or expectant mother's denial of the allegations can be relevant to this issue. If a petition has been filed by the time of the hearing, defense counsel should review the petition for possible challenges, including challenges to the sufficiency of the petition. See [chapter 7, \*infra\*](#), for a discussion of challenges to petitions.

Defense counsel should focus on the criteria for holding children in secure or nonsecure custody, or expectant mothers in nonsecure custody, and should prepare to argue that the criteria have not been met. Generally, the more restrictive the level of custody, the more proof required that, if not held, the child would be in danger or would pose a danger to the safety of others. For example, the most restrictive level of custody—the juvenile detention facility—requires a showing of probable cause of any of the following:

1. The juvenile is a fugitive. [Wis. Stat. § 938.208\(2\)](#).
2. After placement in nonsecure custody by an intake worker or court, the child either ran away or committed a delinquent act and there exists no suitable alternative to placement in secure custody. [Wis. Stat. §§ 48.208\(4\), 938.208\(4\)](#).
3. The juvenile has committed a delinquent act and a substantial risk exists either that the juvenile will harm another person or that the juvenile will run away and be unavailable for court or a revocation hearing. [Wis. Stat. § 938.208\(1\)](#).
4. The juvenile has been alleged or adjudged delinquent, has run away from another county, and would run away from nonsecure custody pending return. [Wis. Stat. § 938.208\(5\)](#).

**Note.** Under the fourth circumstance above, a juvenile can be placed in secure custody for only 24 hours (extendable, for good cause, for an additional 24 hours). *Id.* The 24-hour period begins running at the end of the day on which the decision to hold the juvenile was made.

Finally, a child can be held in a juvenile detention facility if the child needs protection from an imminent physical threat from another person and consents to the placement. [Wis. Stat. §§ 48.208\(3\), 938.208\(3\)](#).

These criteria demonstrate that a presumption runs strongly against holding in secure custody a child not yet adjudicated delinquent unless a substantial risk exists that the child will harm another person, that the child will run away and not be available for court or a hearing, or that the child needs protection from imminent danger and there exists no suitable alternative to nonsecure custody. If, for example, the alleged delinquent act did not qualify as a crime against a person or did not involve the use of weapons, these factors would support an argument that the child did not pose a substantial risk of harm to another person. Or, if the child ran away in the past but remained available for the court, this history might refute the claim that there is a substantial risk that the child will be unavailable for the court in the future.

By offering alternatives to secure custody or to custody outside the home, defense counsel can significantly affect whether the court orders the client (or the client's child) held in custody. Although the state or county bears the legal burden of showing that the proposed placement is the least restrictive option, defense counsel has the responsibility of proposing and finding an alternative placement. An argument for alternative placement is unlikely to persuade the juvenile court if the court is unaware of other locations where the child or expectant mother can be placed. Counsel must prepare to demonstrate that the parents or other relatives can provide a safe environment for the child or expectant mother, can ensure compliance with curfew and other restrictions, and can make certain that the child or expectant mother appears for future court hearings.

In preparing for the detention hearing, defense counsel should gather information about the client, including prior adjudications and dispositions, prior placements, school status, mental health, alcohol or other drug abuse issues, and family dynamics. In addition, defense

counsel should review the court file. Before the hearing, defense counsel should take time to explain court procedures to the client, including court decorum, the role of the various parties, and how the case will likely proceed (including the availability of a trial, the importance of staying out of trouble while the case is pending, and potential dispositions if the allegations in the petition are proved). Defense counsel and the intake worker should discuss the intake worker's placement recommendation and any other background information the worker has on the child and the parent or the expectant mother.

## D. Custody Orders [§ 5.38]

If the court determines that the criteria of [Wis. Stat. § 48.205](#) or [Wis. Stat. § 938.205](#) are met, the court can order the child or expectant mother placed at home (with reasonable restrictions) or order the child or expectant mother held under [Wis. Stat. § 48.207](#) or [938.207](#), [48.208](#) or [938.208](#), or [48.209](#) or [938.209](#), if the criteria of those provisions are met. Reasonable restrictions include restrictions on the child's or expectant mother's travel and associations with other people or places, curfew, and supervision by an agency. The court can place reasonable restrictions on the parent or expectant mother to ensure the safety of the child or unborn child as well. [Wis. Stat. §§ 48.21\(4\)\(a\)](#), [48.213\(3\)\(a\)](#), [938.21\(4\)\(a\)](#). Under [Wis. Stat. ch. 938](#), the court can include a condition that the juvenile submit to electronic monitoring. [Wis. Stat. § 938.21\(4m\)](#).

**Comment.** The reasonableness of a condition of adult probation depends on whether the condition serves the goals of probation. *State v. Jackson*, 128 Wis. 2d 356, 362, 382 N.W.2d 429 (1986). As with all orders under [Wis. Stat. ch. 48](#) and [Wis. Stat. ch. 938](#), conditions of a custody order must address the needs of a particular child, expectant mother, or family.

Failure to comply with the conditions of the custody order can result, with notice, in the order being amended and the child or expectant mother being returned to another form of custody. [Wis. Stat. §§ 48.21\(6\)\(a\)](#), [48.213\(5\)](#), [938.21\(6\)](#). If a child meets the criteria of [Wis. Stat. § 48.208](#), the child can be transferred to secure custody. [Wis. Stat. § 48.21\(6\)\(a\)](#). In delinquency and JIPS cases, if a juvenile meets the criteria of [Wis. Stat. § 938.208](#) and is transferred to secure custody, the juvenile has a right to a detention hearing. [Wis. Stat. § 938.21\(2\)\(am\)](#), (6).

Orders to hold a child in custody must comply with [Wis. Stat. §§ 48.21\(5\)](#) and [938.21\(5\)](#). An order to hold an adult expectant mother in custody must comply with [Wis. Stat. § 48.213\(4\)](#). The court must put the order in writing, and the order must list the reasons and criteria for the decision. [Wis. Stat. §§ 48.21\(5\)\(a\)](#), [48.213\(4\)](#), [938.21\(5\)\(a\)](#). A custody order for holding a child outside the child's home must also include all the following:

1. A finding that continued placement of the child in the home would be contrary to the child's welfare, [Wis. Stat. §§ 48.21\(5\)\(b\)1.](#), [938.21\(5\)\(b\)1.](#);
2. A finding as to whether the person who took the child into custody and the intake worker have made reasonable efforts to prevent removal of the child from the home, while ensuring the child's health and safety are paramount concerns, [Wis. Stat. §§ 48.21\(5\)\(b\)1.](#), [938.21\(5\)\(b\)1.](#);
3. A finding as to whether the person who took the child into custody and the intake worker have made reasonable efforts to make it possible for the child to safely return home, [Wis. Stat. §§ 48.21\(5\)\(b\)1.](#), [938.21\(5\)\(b\)1.](#);
4. If the child is under the supervision of the county department (or, in a Children's Code proceeding in Milwaukee County, if the child is under the supervision of the DCF), an order ordering the child into the placement and care responsibility of the county department (or the DCF) as required under 42 [U.S.C. § 672\(a\)\(2\)](#) and assigning the county department (or the DCF) primary responsibility for providing services to the child, [Wis. Stat. §§ 48.21\(5\)\(b\)1.d.](#), [938.21\(5\)\(b\)1.d.](#); and
5. If the child is held in custody in a residential care center for children and youth, group home, or shelter care facility certified as a "qualified residential treatment program" under [Wis. Stat. § 48.675](#), a finding about each of the following, after considering the qualified individual's standardized assessment and recommendation: (a) whether the child's needs can be met through placement in a foster home; (b) whether the placement of the child in a residential care center for children and youth, group home, or shelter care facility certified under [Wis. Stat. § 48.675](#) provides the most effective and appropriate level of care for the child in the least restrictive environment; (c) whether the placement is consistent with the short-term and long-term goals for the child, as identified in the permanency planning; and (d) whether the judge or court commissioner approves or disapproves the placement. [Wis. Stat. §§ 48.21\(5\)\(b\)2g.](#), [938.21\(5\)\(b\)2g.](#); and

**Note.** If the results of the assessment are not available at the time of the custody order, the court must issue an order making these findings no later than 60 days after the date on which the placement was made. [Wis. Stat. §§ 48.21\(5\)\(cm\)](#), [938.21\(5\)\(cm\)](#).

6. If the child has one or more siblings who have also been removed from the home, a finding as to whether the intake worker has made reasonable efforts to place the child in a placement that enables the sibling group to remain together, unless the court determines that a joint placement would be contrary to the safety or well-being of the child or any sibling, in which case the court must order reasonable efforts be made to provide for frequent visitation or other ongoing interaction between the child and the sibling(s), unless the court determines that such visitation or interaction would be contrary to the safety or well-being of the child or any sibling, [Wis. Stat.](#) §§ 48.21(5)(b)2m., 938.21(5)(b)2m.

If there is good cause to show that sufficient information is not available for the court to make the finding related to the efforts to prevent removal of the child from the home while ensuring the safety and health of the child are paramount concerns, then the court order must include not only the finding as to whether reasonable efforts have been made to make it possible for the child to return safely home but also an order to the responsible department or agency to provide, by no later than five days (excluding Saturdays, Sunday, and legal holidays) after the date on which the order is granted, sufficient information for the court to make the finding related to the efforts to prevent the removal of the child from the home. [Wis. Stat.](#) §§ 48.21(5)(b)1m., 938.21(5)(b)1m.

If any circumstances (referred to elsewhere in this discussion as “the circumstances” or “the specified circumstances”) in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. apply, then the second and third findings above are not required. Instead, the order must include a determination that the responsible department or agency need not make reasonable efforts to make it possible for the child to return home. [Wis. Stat.](#) §§ 48.21(5)(b)3., 938.21(5)(b)3. The circumstances include that the parent has subjected the child to “aggravated circumstances,” including abandonment, torture, chronic abuse, or sexual abuse; the parent has committed certain specified crimes, such as attempted homicide, against a child of the parent; the parent has committed certain specified crimes, such as sexual assault, resulting in great or substantial bodily harm to the child or another child of the parent; the parent has committed child trafficking against a victim who was the parent’s child; the parental rights of the parent to another child have been involuntarily terminated; or, under [Wis. Stat.](#) ch. 48, the parent relinquished custody of the child when the child was 72 hours old or younger. [Wis. Stat.](#) §§ 48.355(2d)(b)1.–5., 938.355(2d)(b)1.–4.

The custody order must also include a statement that the court approves the placement recommended by the intake worker, if that recommendation is followed; or a statement that the court has given bona fide consideration to the intake worker’s and parties’ recommendations, if the intake worker’s recommendation for placement is not followed. [Wis. Stat.](#) §§ 48.21(5)(b)2., 938.21(5)(b)2.

The court must make the findings under [Wis. Stat.](#) §§ 48.21(5)(b)1., 1m., and 938.21(5)(b)1., 1m. (related to the agency’s reasonable efforts to prevent removal of the child from the home and to return the child safely to the home) and under [Wis. Stat.](#) §§ 48.21(5)(b)3. and 938.21(5)(b)3. (related to the determination that reasonable efforts are not required when one of the specified circumstances applies) on a case-by-case basis, based on circumstances specific to the child, and the court must document that information in the custody order. [Wis. Stat.](#) §§ 48.21(5)(c), 938.21(5)(c). A mere reference to the statutes that require these findings is not sufficient to comply with this requirement. [Wis. Stat.](#) §§ 48.21(5)(c), 938.21(5)(c). Moreover, an amended order that retroactively corrects an earlier, insufficient custody order is insufficient to comply with this requirement.

If the court finds that the responsible agency need not make reasonable efforts to return the child to the home (because one of the specified circumstances applies), the court must hold a hearing under [Wis. Stat.](#) § 48.38(4m) or [Wis. Stat.](#) § 938.38(4m) within 30 days after that finding to determine the permanency goal and, if applicable, any concurrent permanency goals for the child. [Wis. Stat.](#) §§ 48.21(5)(d), 938.21(5)(d).

Under [Wis. Stat.](#) §§ 48.21(5)(e) and 938.21(5)(e), the court must order the agency primarily responsible for providing services to conduct a diligent search to locate and provide notice of the information described in those statutes to all the child’s relatives that the parent has named at the hearing under [Wis. Stat.](#) § 48.21(3)(f) or [Wis. Stat.](#) § 938.21(2)(e) or (3)(f), and to all the child’s adult relatives as defined in [Wis. Stat.](#) § 48.21(5)(e)1. and [Wis. Stat.](#) § 938.21(5)(e)1. The agency must do this within 30 days after the child is removed from the custody of the child’s parent, unless the child is returned to the child’s home within that period. The court may also order the county department or responsible agency (or the DCF in a [Wis. Stat.](#) ch. 48 case in Milwaukee County) to conduct a diligent search to locate and provide notice of the information specified in [Wis. Stat.](#) §§ 48.21(5)(e)2. and 938.21(5)(e)2. to all other adult individuals named at the hearing under [Wis. Stat.](#) § 48.21(3)(f) or [Wis. Stat.](#) § 938.21(2)(e) or (3)(f) within 30 days after the child is removed from the custody of the child’s parent, unless the child is returned to the child’s home within that period. The agency must not provide that notice to a person named or to an adult relative if the county department or agency (or the DCF in a [Wis. Stat.](#) ch. 48 case in Milwaukee County) has reason to believe that it would be dangerous to the child or to the parent if the child were placed with that person or adult relative. The notice must include all the following:

1. A statement that the child has been removed from the custody of the child’s parent;

2. A statement that explains the recipient's options under state or federal law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice;
3. A description of the requirements to obtain a foster home license or to receive kinship care or long-term kinship care payments, and of the additional services and supports that are available for children placed in a foster home or in the home of a person receiving those payments;
4. A statement advising the recipient that additional expenses might be incurred if the child is placed in the recipient's home and that reimbursement for some of those expenses may be available; and
5. The name and contact information of the agency that removed the child from the custody of the child's parent.

[Wis. Stat.](#) §§ 48.21(5)(e), 938.21(5)(e).

A temporary physical custody order remains in effect until a disposition is granted, a consent decree is entered into, a petition under [Wis. Stat.](#) § 48.25 (or [Wis. Stat.](#) § 938.25) is withdrawn or dismissed, or the order is modified or terminated by further court order. [Wis. Stat.](#) §§ 48.21(5m), 48.213(4m), 938.21(5m).

Under [Wis. Stat.](#) § 48.297 or [Wis. Stat.](#) § 938.297, if a child or an expectant mother is in custody and the court grants a motion to dismiss based on a defect in the petition, the court can, pending the filing of a new petition, order the child or expectant mother continued in custody for up to 48 hours. [Wis. Stat.](#) §§ 48.297(5), 938.297(5).

## E. Appeals of Custody Orders [§ 5.39]

In addition to exercising the right to a rehearing of the custody order (as discussed in sections [5.26](#) and [5.31](#), *supra*), defense counsel can also seek appellate review of the order by interlocutory appeal, supervisory writ, or habeas corpus. Appeal of a custody order does not qualify as an appeal as of right under [Wis. Stat.](#) § 809.30 or [Wis. Stat.](#) § 809.40. Therefore, counsel should not file a notice of intent to pursue postdispositional relief from a custody order. See [chapter 13](#), *infra*, for a discussion of how to appeal various types of juvenile court orders.

## VIII. Postadjudication Commitment to Secure Custody [§ 5.40]

### A. In General [§ 5.41]

After adjudication, the court can order a juvenile committed to secure custody in five circumstances: (1) at disposition, to a juvenile correctional facility or secured residential care center for children and youth; (2) at disposition, to a juvenile detention facility or juvenile portion of a county jail; (3) postdisposition, to a juvenile correctional facility, pursuant to a change in placement; (4) postdisposition, to a juvenile detention facility or a county jail, as a sanction for noncompliance with a dispositional order; and (5) as a sanction for remedial or punitive contempt under [Wis. Stat.](#) ch. 785.

A juvenile's caseworker also has limited authority to require secure custody. [Wis. Stat.](#) § 938.355(6d); *see also infra* § [5.47](#).

### B. [Disposition Under Wis. Stat. § 938.34\(4m\)](#) [§ 5.42]

Commitment to a juvenile correctional facility or a secured residential care center for children and youth is a disposition available only for juveniles who have been adjudicated delinquent for an act that would be punishable by a sentence of six months or more if committed by an adult. [Wis. Stat.](#) § 938.34(4m)(a). A *secured residential care center for children and youth* is a "facility that complies with the requirements of [[Wis. Stat.](#) §§] 301.37 and 938.48(16)(b) operated by an Indian tribe or a county under [[Wis. Stat.](#) §§] 46.20, 59.53(8m), and 938.22(1)(a) or by a child welfare agency that is licensed under [[Wis. Stat.](#) §] 48.66(1)(b) to hold in secure custody persons adjudged delinquent." [Wis. Stat.](#) § 938.02(15g). Thus, juveniles found guilty of committing Class B or C misdemeanors cannot be committed to a secured correctional facility or secured residential care center for children and youth under [Wis. Stat.](#) § 938.34(4m). [Wis. Stat.](#) § 939.51(3)(b), (c).

In addition, the court can commit a juvenile to a juvenile correctional facility or secured residential care center for children and youth only if the juvenile poses a danger to the public *and* needs restrictive custodial treatment. [Wis. Stat.](#) § 938.34(4m)(b). (As with any



discretionary decision, facts in the record must support this conclusion.) Under [Wis. Stat.](#) § 938.34(4m)(b), prima facie evidence that a juvenile poses a danger to the public and needs restrictive custodial treatment exists if the juvenile

1. Has committed a delinquent act that would be a felony if committed by an adult, [Wis. Stat.](#) § 938.34(4m)(b)1.;
2. Possessed, used, or threatened to use a handgun, [Wis. Stat.](#) § 175.35(1)(b), short-barreled rifle, [Wis. Stat.](#) § 941.28(1)(b), or short-barreled shotgun, [Wis. Stat.](#) § 941.28(1)(c), while committing a delinquent act that would qualify as a felony under [Wis. Stat.](#) ch. 940 if committed by an adult, [Wis. Stat.](#) § 938.34(4m)(b)2.; or
3. Has possessed or gone armed with a short-barreled rifle, short-barreled shotgun, or handgun in violation of [Wis. Stat.](#) § 941.28 or [Wis. Stat.](#) § 948.60, [Wis. Stat.](#) § 938.34(4m)(b)3.

Felonies listed under [Wis. Stat.](#) § 938.34(4m)(b)1. include

1. First-degree intentional homicide under [Wis. Stat.](#) § 940.01;
2. First-degree reckless homicide under [Wis. Stat.](#) § 940.02;
3. Felony murder under [Wis. Stat.](#) § 940.03;
4. Second-degree intentional homicide under [Wis. Stat.](#) § 940.05;
5. Aggravated battery under [Wis. Stat.](#) § 940.19(2)–(6);
6. Physical abuse of an elder person under [Wis. Stat.](#) § 940.198;
7. Mayhem under [Wis. Stat.](#) § 940.21;
8. First-degree sexual assault under [Wis. Stat.](#) § 940.225(1);
9. Kidnapping under [Wis. Stat.](#) § 940.31;
10. Endangering safety by use of a dangerous weapon under [Wis. Stat.](#) § 941.20(3);
11. Arson under [Wis. Stat.](#) § 943.02(1);
12. Carjacking under [Wis. Stat.](#) § 943.23(1g);
13. Armed robbery under [Wis. Stat.](#) § 943.32(2);
14. Harassment under [Wis. Stat.](#) § 947.013(1t), (1v), or (1x);
15. First-degree sexual assault of a child under [Wis. Stat.](#) § 948.02(1);
16. Second-degree sexual assault of a child under [Wis. Stat.](#) § 948.02(2);
17. Repeated sexual assault of the same child under [Wis. Stat.](#) § 948.025;
18. Physical abuse of a child under [Wis. Stat.](#) § 948.03; and
19. Sexual assault of a child in substitute care under [Wis. Stat.](#) § 948.085(2).

Beyond the statutorily defined evidence, the Wisconsin Supreme Court has held that danger to the public means “expos[ing] the public to harm, injury, pain or loss.” *B.M. v. State (In the Int. of B.M.)*, 101 Wis. 2d 12, 18, 303 N.W.2d 601 (1981). Thus, a juvenile can endanger the public if the juvenile presents an actual or potential threat to the *property* of another. *Id.* The legislature did not intend to limit the meaning of “danger to the public” to juveniles threatening physical violence or injury. *Id.* Not all delinquent acts demonstrate danger to the public, however. For example, in an unpublished decision, the court of appeals held the evidence insufficient to prove dangerousness when

the child obstructed an officer, *see* [Wis. Stat.](#) § 946.41, and the child’s “history of delinquent behavior” had been “limited to such activities as truancy, running away, possession of alcohol and curfew violations.” *State v. L.L.C. (In the Int. of L.L.C.)*, No. 91-1646-FT, 1991 WL 285924 (Wis. Ct. App. Nov. 7, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *see also* *J.R. v. State (In the Int. of J.R.)*, No. 82-2428, 1983 WL 161556 (Wis. Ct. App. July 26, 1983) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (holding that charge of obstructing an officer was not sufficient proof of dangerousness).

Only a juvenile court judge (not a court commissioner) can commit a child to a juvenile correctional facility or secured residential care center for children and youth. [Wis. Stat.](#) § 757.69(1m)(g); *see also* [infra](#) [ch. 3](#) (roles of parties in juvenile court).

### C. Short-Term Detention Under Wis. Stat. § 938.34(3)(f) [§ 5.43]

Subject to certain conditions, the court can place a delinquent juvenile in a juvenile detention facility or the juvenile portion of a county jail. [Wis. Stat.](#) § 938.34(3)(f). The jail must meet the standards promulgated through rulemaking by the Department of Corrections. *Id.*; *see* [Wis. Admin. Code](#) ch. DOC 346. The placement can be for any combination of single or consecutive days totaling not more than 365 days in a juvenile detention facility under [Wis. Stat.](#) § 938.22(2)(d)1. and can be for no more than 30 consecutive days in any other juvenile detention facility (including any placement under [Wis. Stat.](#) § 938.34(3)(a)–(e)); the juvenile must receive credit (to apply against the period of detention imposed) for all time spent in detention in connection with the course of conduct for which the court imposes the detention. [Wis. Stat.](#) § 938.34(3)(f)1. The order can allow release of the juvenile to attend school, to work, or to attend or participate in any activity that “the court considers beneficial to the juvenile.” [Wis. Stat.](#) § 938.34(3)(f)2. The court cannot use this disposition, however, unless the county board of supervisors has adopted a resolution authorizing these placements as disposition alternatives. [Wis. Stat.](#) § 938.34(3)(f)3. Therefore, this disposition might be available in only some counties.

If a juvenile’s placement under [Wis. Stat.](#) § 938.34(3)(f) exceeds 30 days, whether or not consecutive, the county department must offer the juvenile alcohol or other drug abuse treatment, counseling, and educational services under [Wis. Stat.](#) § 938.34(6r), to be paid for in accordance with [Wis. Stat.](#) § 938.361. [Wis. Stat.](#) § 938.34(3)(f)4.

**Comment.** As noted in section [5.16](#), *supra*, the Juvenile Justice Code contains specific requirements for holding a juvenile in a juvenile detention facility or county jail. Under [Wis. Stat.](#) § 938.208, the intake worker cannot order a child held in a juvenile detention facility unless probable cause exists to believe that the juvenile has committed a delinquent act and presents either a substantial risk of physical harm to another or a substantial risk of running away. [Wis. Stat.](#) § 938.208(1). Under this section, for juveniles who have been adjudged delinquent, the delinquent act can be the act for which the juvenile was adjudged delinquent.

Defense counsel can argue that the court can order short-term placement in a juvenile detention facility or county jail at disposition only if the criteria for secure detention under [Wis. Stat.](#) §§ 938.208 and 938.209, or for commitment to a juvenile correctional facility under [Wis. Stat.](#) § 938.34(4m), have been met. A rule of statutory construction holds that sections of a statute relating to the same subject matter must be read together (*in pari materia*). *R.H.L. v. State (In the Int. of R.H.L.)*, 159 Wis. 2d 653, 659, 464 N.W.2d 848 (Ct. App. 1990). The entire section and related sections should be considered. *R.W.S. v. State (In the Int. of R.W.S.)*, 162 Wis. 2d 862, 471 N.W.2d 16 (1991).

### D. Change in Placement Under Wis. Stat. § 938.357(3) [§ 5.44]

If the original dispositional order does not place the juvenile in a juvenile correctional facility or secured residential care center for children and youth, the court can order this placement if a change in placement is requested. [Wis. Stat.](#) § 938.357(3)(a). The court must hold a hearing unless the juvenile, parent, guardian, and legal custodian waive it. *Id.* The juvenile has a right to counsel, to present relevant evidence, and to cross-examine witnesses. *Id.* The Department of Corrections must have the opportunity to object to a juvenile’s change in placement from a secured residential care center for children and youth to a Type 1 juvenile correctional facility under [Wis. Stat.](#) § 938.357(3)(b). *Id.* The court can order a change in placement only if the court has found, *on the record*, that the conditions of [Wis. Stat.](#) § 938.34(4m)(a) and (b) have been met. *Id.*

### E. Sanctions Under Wis. Stat. § 938.355(6) and (6m) [§ 5.45]

The court can order that a juvenile serve no more than 10 days in a juvenile detention facility or county jail if the juvenile has not complied with the terms of the dispositional order after being adjudged delinquent under [Wis. Stat.](#) ch. 938, found in need of protection or services under [Wis. Stat.](#) § 938.13(6), or found to have violated a municipal ordinance under [Wis. Stat.](#) § 118.163(2). [Wis. Stat.](#) § 938.355(6)(d)1., (6m)(a)1g., (am). [Wis. Stat.](#) § 938.13(6) grants the juvenile court jurisdiction over juveniles alleged to be habitually truant from school. Under [Wis. Stat.](#) § 118.163(2), a county, city, village, or town can enact an ordinance prohibiting children from being habitual truants.



Before ordering a sanction, the court must hold a hearing. The court must also ensure that the case satisfies the notice requirements of [Wis. Stat. § 938.355\(6\)](#) or (6m): (1) the juvenile must have received notice of the conditions and possible sanctions for noncompliance at the dispositional hearing, or (2) before the violation, the juvenile must have acknowledged in writing that the juvenile has read, or has had read to him or her, those conditions and possible sanctions and that the juvenile understands them. [Wis. Stat. § 938.355\(6\)](#), (6m); [F.T. v. State \(In the Int. of F.T.\)](#), 150 Wis. 2d 216, 441 N.W.2d 322 (Ct. App. 1989); *see also* [Wis. Stat. § 938.355\(6\)\(bm\)](#), (6m)(bm) (describing notice requirements in cases involving Indian juveniles). The juvenile has the right to counsel, the right to present evidence, [Wis. Stat. § 938.355\(6\)\(c\)](#), (6m)(c), and the right to remain silent. [State v. B.S. \(In the Int. of B.S.\)](#), 162 Wis. 2d 378, 404, 469 N.W.2d 860 (Ct. App. 1991). The petitioner bears the burden of proving a violation of the dispositional order. *Id.* at 403; *see also* [Wis. Stat. § 938.355\(6\)\(cr\)](#), (6m)(cr) (describing additional findings required in cases involving Indian juveniles removed from the home). The underlying dispositional order must be in writing. [Wis. Stat. § 938.355\(2\)\(b\)](#) (“The court order shall be in writing....”); [State v. Dylan S. \(In the Int. of Dylan S.\)](#), 2012 WI App 25, 339 Wis. 2d 442, 813 N.W.2d 229 (holding that dispositional order for a truancy offense must be reduced to writing before court can impose sanction for violation of dispositional order).

**Comment.** [Wis. Stat. § 938.355\(6\)](#) does not identify criteria for ordering a juvenile placed in a juvenile detention facility or county jail instead of imposing the other, less restrictive sanctions listed under [Wis. Stat. § 938.355\(6\)\(d\)](#) or [Wis. Stat. § 938.355\(6m\)\(a\)](#). Because the court of appeals has held this statute constitutional, *see B.S.*, 162 Wis. 2d at 384–85 (interpreting provisions formerly contained in [Wis. Stat. § 48.355\(6\)](#)), the standards for ordering this most restrictive sanction must be culled from other provisions of the Juvenile Justice Code. Two rules of statutory construction support this conclusion. First, statutes should be read to avoid constitutional invalidity. [State ex rel. Lynch v. Conta](#), 71 Wis. 2d 662, 689, 239 N.W.2d 313 (1976). *superseded by statute on other grounds as noted in State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 5, 265 Wis. 2d 674, 666 N.W.2d 104; *see also, e.g., Bachowski v. Salamone*, 139 Wis. 2d 397, 405, 407 N.W.2d 533 (1987). Second, statutes should be read *in pari materia*. [A. v. Racine Cty. \(In the Int. of G.\)](#), 119 Wis. 2d 349, 352, 349 N.W.2d 743 (Ct. App. 1984). *See* sections [5.15](#) and [5.16](#), *supra*, which discuss the criteria for holding a child in secure custody, and [chapter 16](#) (contempt and juvenile sanctions), *infra*.

## F. Contempt Under [Wis. Stat. Ch. 785](#) [§ 5.46]

Juveniles adjudicated either delinquent or in need of protection or services can be committed to a juvenile detention facility or a county jail if found in contempt of court under [Wis. Stat. ch. 785](#) for failure to comply with the conditions of a dispositional order. [D.L.D. v. Circuit Ct. for Crawford Cnty. \(In the Int. of D.L.D.\)](#), 110 Wis. 2d 168, 327 N.W.2d 682 (1983); [Wis. Stat. § 938.355\(6g\)](#); *see also infra* [ch. 16](#) (contempt and juvenile sanctions).

## G. Short-Term Detention by Caseworker Under [Wis. Stat. § 938.355\(6d\)](#) [§ 5.47]

The caseworker for a juvenile who is adjudged delinquent under [Wis. Stat. ch. 938](#) and who violates a condition of the dispositional order or a condition of aftercare supervision can take the juvenile into custody without a hearing and have the juvenile held in a juvenile detention facility or the juvenile portion of a county jail for not more than 72 hours, while the alleged violation is being investigated or as a consequence of that violation. [Wis. Stat. § 938.355\(6d\)](#); *see also* [Wis. Stat. § 938.534\(1\)](#) (short-term detention for juveniles in the intensive supervision program). In addition, a caseworker may use short-term detention if a juvenile who is found to be in need of protection or services under [Wis. Stat. § 938.13](#) violates a condition of the dispositional order; in such a case, the juvenile may also be taken into custody and placed in nonsecure custody for not more than 72 hours as a consequence of that violation. [Wis. Stat. § 938.355\(6d\)\(c\)](#). As with sanctions under [Wis. Stat. § 938.355\(6\)](#) and (6m), *see supra* [§ 5.45](#), a caseworker cannot use this placement unless the juvenile received notice of the conditions with which the juvenile was expected to comply and of the possibility of placement in detention for noncompliance. [Wis. Stat. § 938.355\(6d\)](#). The use of this placement is subject to written policies adopted by the court, *see* [Wis. Stat. § 938.06\(1\)](#), (2), and to policies adopted by the county board relating to taking juveniles into custody and placing them in short-term detention. [Wis. Stat. § 938.355\(6d\)\(a\)2g](#).

If detained longer than 72 hours, the juvenile is entitled to a hearing. [Wis. Stat. § 938.355\(6d\)](#); *see infra* [ch. 16](#) (contempt and juvenile sanctions).

## IX. Custodial Interrogation [§ 5.48]

Holding a child or expectant mother in custody amounts to an arrest for the purpose of suppression motions based on illegal arrest or challenges to a child’s or expectant mother’s confession on voluntariness grounds or under *Miranda v. Arizona*. [Wis. Stat. §§ 48.19\(3\)](#), 48.193(3), 48.297(4), 938.19(3), 938.297(4); [Miranda v. Arizona](#), 384 U.S. 436 (1966).

In *State v. Jerrell C.J. (In the Interest of Jerrell C.J.)*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110, the Wisconsin Supreme Court exercised its supervisory power to require that custodial interrogations of juveniles be electronically recorded when feasible and that all custodial interrogations of juveniles be electronically recorded when questioning occurs at a place of detention. The Wisconsin Legislature codified this holding by creating [Wis. Stat. § 938.195\(2\)](#). Unrecorded interrogations and any resultant written confessions are inadmissible as evidence in court. [Wis. Stat. § 938.31\(3\)\(b\), \(c\), \(d\); Jerrell C.J., 2005 WI 105, ¶ 47](#), 283 Wis. 2d 145. Some exceptions apply. These exceptions, listed in [Wis. Stat. § 938.31\(3\)\(c\)](#), arise when any of the following occurs:

1. The juvenile refused to respond or cooperate in the custodial interrogation if an audio or audio and visual recording was made of the interrogation so long as a law enforcement officer or agent of a law enforcement agency made a contemporaneous audio or audio and visual recording or written record of the juvenile's refusal.

**Note.** See *State v. Moore*, 2015 WI 54, 363 Wis. 2d 376, 864 N.W.2d 827, in which the supreme court held that a juvenile did not “refus[e] to respond or cooperate” with police officers during an interrogation, making it a violation of [Wis. Stat. § 938.195](#) for officers to cease recording the interrogation, *id.* ¶ 8, but concluded that “the error, if any, in not suppressing some of [the juvenile’s] statements, was harmless,” *id.* ¶ 9.

2. The statement was made in response to a question asked as part of the routine processing after the juvenile was taken into custody.
3. The law enforcement officer or agent of a law enforcement agency conducting the interrogation in good faith failed to make an audio or audio and visual recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or, without the officer’s or agent’s knowledge, the equipment malfunctioned or stopped operating.
4. The statement was made spontaneously and not in response to a question by a law enforcement officer or agent of a law enforcement agency.
5. Exigent public safety circumstances existed that prevented the making of an audio or audio and visual recording or rendered the making of such a recording infeasible.

Additionally, the court might determine that other good cause exists for not suppressing the juvenile’s statement under [Wis. Stat. § 938.31\(3\)\(b\)](#). [Wis. Stat. § 938.31\(3\)\(c\)](#).

The Wisconsin Court of Appeals has held that a juvenile is in custody while in the back of a locked squad car, near a school. Further, the court held that it would have been “feasible” for the officer to record the initial interrogation of the juvenile if the officer had waited to conduct the interrogation until the officer and the juvenile had reached the school. *State v. Dionicia M. (In the Int. of Dionicia M.)*, 2010 WI App 134, 329 Wis. 2d 524, 791 N.W.2d 236. Similarly, the court of appeals determined that a juvenile in a residential treatment facility under a court order was in custody, and a statement taken at the facility violated *Miranda*. *State v. J.T.M. (In the Int. of J.T.M.)*, No. 2015AP1585, 2016 WL 3884577 (Wis. Ct. App. July 19, 2016) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

The U.S. Supreme Court has held that a child’s age properly informs the *Miranda* custody analysis. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011). The Court stated: “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.” *Id.* at 277. In *J.D.B.*, before giving *Miranda* warnings, police took a 13-year-old student to a school conference room and questioned him about recent crimes, to which the student subsequently confessed. The Supreme Court remanded the case for the state courts to determine whether the child was in custody when the police interrogated him. The Supreme Court instructed the courts on remand to take into account “all of the relevant circumstances of the interrogation, including [the child’s] age at the time.” *Id.* at 281.

## X. Practice Forms [§ 5.49]

The forms in this section are offered as practice guides. Always check original sources of authority for current law. When using the sample forms, also check local practice and adapt the form language to fit the client’s circumstances. Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System’s website, at <https://www.wicourts.gov/forms1/circuit.htm>. A list of those standard court forms is included in [appendix B](#), *infra*.

**A. Notice and Motion for Amendment of Detention Order (Form CRM-0175) [§ 5.50]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_



NOTICE AND MOTION FOR AMENDMENT OF DETENTION ORDER<sup>[2]</sup>

TO: (Juvenile)  
(Attorney for juvenile)  
(Juvenile's parent, guardian, or legal custodian)

1. PLEASE TAKE NOTICE that (district attorney's name), acting as a representative of the State of Wisconsin, (name of county) County, moves the court, pursuant to Wis. Stat. § 938.21(6), to amend the detention order relating to (juvenile's name) and entered by the court on (date).

***[Choose appropriate alternative]***

2. This motion will be heard ***[add if appropriate]*** (by telephone):

BEFORE: \_\_\_\_\_ (Assigned judge)  
 PLACE: \_\_\_\_\_ County Courthouse  
 \_\_\_\_\_ (Courthouse address)  
 DATE: \_\_\_\_\_  
 TIME: \_\_\_\_\_

**[or]**

2. This motion will be heard at a time, date, and place to be set by the court.

3. The grounds for this motion are as follows.

a. On (date), the court entered an order, pursuant to Wis. Stat. § 938.21(4)(a), placing (juvenile's name) in (identify placement), under the supervision of (identify custodian).

b. The order included the following conditions:

(1) \_\_\_\_\_ (Specify conditions)

(2) \_\_\_\_\_

c. On (date), the juvenile, (juvenile's name), was apprehended by (name of person taking into custody) for allegedly (describe allegation), a violation of the terms of the order.

***[Choose appropriate alternative]***

d. (Juvenile's name) has admitted committing the above act.

**[or]**

d. *(Provide other statement of the charge's authenticity)*

**[Continue by choosing appropriate alternative(s)]**

e. The criteria contained in [Wis. Stat. § 938.205](#) for holding a juvenile in nonsecure custody are met in the circumstances of this case for the following reasons:

- (1) \_\_\_\_\_  
(State reasons)
- (2) \_\_\_\_\_

f. The criteria contained in [Wis. Stat. § 938.208](#) for holding a juvenile in secure detention are met in the circumstances of this case for the following reasons:

- (1) \_\_\_\_\_  
(State reasons)
- (2) \_\_\_\_\_

Dated \_\_\_\_\_

[Type "Electronically signed by"  
and your name on this line]

District Attorney \_\_\_\_\_

County \_\_\_\_\_

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

## B. Order for Amendment of Detention Order (Form CRM-0176) [§ 5.51]

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH \_\_\_\_\_

\_\_\_\_\_ COUNTY

In the Interest of

\_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_







**ORDER FOR AMENDMENT OF DETENTION ORDER** <sup>[3]</sup>

---

***[Choose appropriate alternative]***

***[If hearing held]***

The court heard the district attorney's motion for amendment of the detention order relating to (juvenile's name) on (date). Appearing before the court on the motion were

*(Insert names of people appearing)*

***[If hearing not held]***

The district attorney moved for amendment of the detention order relating to (juvenile's name). No hearing was held; the court decided the motion on (date), based on the supporting papers of the parties.

***[Continue]***

**FINDINGS:**

1. The juvenile, (juvenile's name), has violated the terms of the court's order for nonsecure custody issued pursuant to [Wis. Stat. § 938.21\(4\)\(a\)](#), dated (date), in that *(he)* *(she)* has:

- a. *(State reasons)*
- b.

2. Furthermore, the criteria for *(nonsecure custody)* *(secure detention)* of a juvenile are met in this case for the following reasons:

- a. *(State reasons)*
- b.

**IT IS ORDERED:**

1. (Juvenile's name) is to be placed in *(nonsecure custody)* *(secure detention)* at (identify placement) under the supervision of (custodian's name), with the following conditions:

- a. *(State conditions)*
- b.

2. Such custody is to continue until (date), when *(he)* *(she)* shall be brought before this court for further consideration of the custody.

**C. Request for a New Detention Hearing and for a Revision of the Detention Order (Form CRM-0177) [§ 5.52]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_



**REQUEST FOR A NEW DETENTION  
HEARING AND FOR A REVISION  
OF THE DETENTION ORDER <sup>[4]</sup>**

1. (Juvenile's name), by (his) (her) attorney, requests the court, pursuant to [Wis. Stat. § 938.21\(2\)\(am\)](#), to hold a hearing on the question of (his) (her) detention and to revise the detention order currently applicable to (him) (her).

2. The grounds for this motion are as follows.

a. On (date), (juvenile's name) was placed in nonsecure detention. On (date), (juvenile's name) agreed to waive (his) (her) detention hearing. Therefore, a detention hearing has not been held to consider the current nonsecure detention placement.

b. (Juvenile's name) seeks a detention hearing for the following reasons:

(1)

*(State reasons)*

(2)

c. (Juvenile's name) has information to present to the court that would indicate that a more appropriate detention placement would be (identify placement), under the following conditions:

(1)

*(State conditions)*

(2)

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]

(Attorney's name)

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**D. Motion to Review the Decision of the Circuit Court Commissioner (Form CRM-0178)**  
**[§ 5.53]**



STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



## MOTION TO REVIEW THE DECISION OF THE CIRCUIT COURT COMMISSIONER <sup>[5]</sup>

1. (Juvenile's name), by (his) (her) attorney, moves the court, pursuant to [Wis. Stat. § 757.69\(8\)](#), to review the decision of the circuit court commissioner rendered on (date) and appended to this request.

2. The grounds for this motion are as follows.

a. On (date), (juvenile's name) appeared before the court commissioner for the purpose of (state purpose).

b. On that occasion, (juvenile's name) presented the following information to the court commissioner:

(1)

*(State information)*

(2)

c. In addition to the above information, the following has come to light since the hearing before the court commissioner:

(1)

*(State new information)*

(2)

d. Based on this information, the proper decision of the court in this matter should be (state decision).

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

### E. Motion for Release from Secure Detention (Form CRM-0179) [§ 5.54]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



## MOTION FOR RELEASE FROM SECURE DETENTION <sup>[6]</sup>

---

1. *(Juvenile's name)*, by *(his) (her)* attorney, moves the court to order *(his) (her)* release from secure detention and placement in custody of *(custodian's name)*.

2. The grounds for this motion are as follows.

a. On *(date)*, *(juvenile's name)* was apprehended by *(name of person taking into custody)*, was taken to the juvenile detention facility at *(location)*, and was there confined.

b. At no time before this confinement, and at no later time, has *(juvenile's name)* been personally interviewed by a person acting as an intake worker for this court, as required by [Wis. Stat. § 938.067\(2\)](#).

c. The detention hearing in this matter *(has not yet been held or scheduled) (is scheduled for (date))*, and holding *(juvenile's name)* inappropriately in secure custody until that time would be harmful to *(him) (her)* and not in the best interests of *(juvenile's name)* or the public.

d. *(Custodian's name)* is fully capable of supervising *(juvenile's name)*, and *(he) (she)* would be a proper custodian until the issues of custody pending adjudication are fully decided.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

## F. Motion for Release from Secure Custody and for an Alternative Placement Pending Adjudication (Form CRM-0180) [§ 5.55]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

### MOTION FOR RELEASE FROM SECURE CUSTODY AND FOR AN ALTERNATIVE PLACEMENT PENDING ADJUDICATION

1. (Juvenile's name), by (his) (her) attorney, moves the court to rehear the issue of (his) (her) detention, pursuant to [Wis. Stat. § 938.21\(2\)\(d\)](#); to order (his) (her) release from secure custody; and, as an alternative to secure custody, to order placement at (identify placement).
2. The grounds for this motion are as follows.
  - a. (He) (She) was taken into custody on (date), at (time), for allegedly (describe allegation).
  - b. An intake interview was conducted by (intake worker's name), the intake worker of this (court) (county), and at that time the intake worker recommended placement in secure custody because (state reason).
  - c. On (date), at (time), a detention hearing was conducted before the court commissioner, and (he) (she) ordered that the placement in secure custody continue because (state reason).
  - d. The reasons for continuing placement in secure custody (have changed) (are inappropriate) because (state reason).
  - e. An alternative placement for (juvenile's name) exists, namely, (identify placement) **[add if appropriate]** (and the operators of this facility have agreed to supervise (him) (her)).
  - f. The policy of the Juvenile Justice Code, [Wis. Stat. ch. 938](#), is to use secure detention only if no other placement is possible.

Dated \_\_\_\_\_

(Firm/Office name)  
Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]  
\_\_\_\_\_  
(Attorney's name)

(Attorney's address)



*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**G. Petition for Writ of Habeas Corpus (Form CRM-0181) [§ 5.56]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

STATE OF WISCONSIN ex rel.

(Juvenile's name)

v.

Case No. \_\_\_\_\_

(Name of person with custody of juvenile)



## PETITION FOR WRIT OF HABEAS CORPUS<sup>1,2</sup>

(Juvenile's name), by *(his) (her)* attorney, petitions the court for a writ of habeas corpus and states:

1. (Juvenile's name) is restrained of *(his) (her)* liberty and is presently held by (custodian's name) at (location).
2. (Juvenile's name) is not imprisoned by virtue of any judgment, order, or execution specified in [Wis. Stat. § 782.02](#).
3. According to (juvenile's name)'s information, the cause of this imprisonment is an order for secure detention entered by Judge (judge's name) in the juvenile court of (name of county) County, and a copy of this order is attached.
4. This imprisonment is illegal *(because (state reasons)) (for the reasons stated in the attached memorandum)*.<sup>2</sup>
5. (Juvenile's name) should be released to the temporary custody of (proposed custodian's name) pending resolution of this issue because this person is capable of the control of (juvenile's name) and will be able to present *(him) (her)* before this court at the time ordered.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for (juvenile's name)

*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No.

Signed and sworn to before me

on \_\_\_\_\_ *(date)*

by \_\_\_\_\_

Notary Public, State of Wisconsin

My commission

☐ This notarial act involved the use of communication technology.

### H. Writ of Habeas Corpus and Order for Temporary Release (Form CRM-0182) [§ 5.57]

---

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH \_\_\_\_\_

\_\_\_\_\_ COUNTY

---

STATE OF WISCONSIN ex rel.

*(Juvenile's name)* \_\_\_\_\_

v.

Case No. \_\_\_\_\_

*(Name of person with custody of juvenile)* \_\_\_\_\_

---



**WRIT OF HABEAS CORPUS AND ORDER FOR TEMPORARY RELEASE <sup>18]</sup>**

---

**WRIT OF HABEAS CORPUS**

*(Name of person with custody of juvenile)* is commanded to have *(juvenile's name)*, by *(name of person with custody of juvenile)* imprisoned and detained, before this court at *(time)* on *(date)* for the purpose of *(identify type of proceeding)*.

**ORDER FOR TEMPORARY RELEASE**

Notwithstanding the writ issued by this court on *(date)*,

IT IS ORDERED that *(name of person with custody of juvenile)* release *(juvenile's name)* immediately to the custody of *(temporary custodian's name)* and present *(juvenile's name)* to this court at the date and time noted in the writ.



**I. Motion to Release from Custody for Failure to Comply with [Wis. Stat. § 938.21](#) (Form CRM-0183) [§ 5.58]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

**MOTION TO RELEASE FROM CUSTODY FOR  
FAILURE TO COMPLY WITH [WIS. STAT. § 938.21](#)**

1. (Juvenile's name), by *(his) (her)* attorney, moves the court for an order releasing *(him) (her)* from custody.

2. The grounds for this motion are as follows.

a. (Juvenile's name)'s continued detention violates [Wis. Stat. § 938.21](#), because the conditions stated in [Wis. Stat. § 938.21\(1\)](#) (b) are not satisfied.

b. Under [Wis. Stat. § 938.21\(1\)\(b\)](#), if no petition has been filed by the time of the custody hearing, a juvenile may be held in custody with approval of the judge for an additional 48 hours from the time of the hearing ONLY IF the judge determines that probable cause exists to believe that:

(1) the juvenile is an imminent danger to himself or herself or others; OR

(2) the parent, guardian, or legal custodian of the juvenile or any other responsible adult is neglecting, refusing, unable, or unavailable to provide adequate supervision and care.

If either of these criteria are not satisfied, a juvenile may not be held in custody during the extension period.

c. On (date), a custody hearing was held in Branch (number), (name of county) County Circuit Court, Judge (judge's name) presiding. Judge (judge's name) granted an extension for the state to file a delinquency petition. The next hearing was scheduled for (date). (Juvenile's name) was ordered to remain in custody at the (name of county) County Jail, Juvenile Section, until (date).

d. Although (juvenile's name) was ordered to remain in custody, no facts were alleged that could support a finding that either of the conditions established in [Wis. Stat. § 938.21\(1\)\(b\)](#) was satisfied. There were no allegations that (juvenile's name) made threats or overt acts that would place *(him) (her)* or any other person in imminent harm. There were no allegations that (juvenile's name)'s parent, guardian or legal custodian, or other responsible adult, (name of parent, guardian or legal custodian, or other responsible adult), is neglecting, refusing, unable, or unavailable to provide adequate supervision and care.

WHEREFORE, (juvenile's name) requests immediate release from custody and further requests that specific facts and findings of law supporting *(his) (her)* continued detention be stated on the record.

This motion is made subject to objection to the jurisdiction of the court.

Dated \_\_\_\_\_

*(Firm/Office name)*  
Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*  
*(Attorney's email address)*  
*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**J. Motion to Release from Custody for Failure to Comply with [Wis. Stat. § 938.205](#) (Form CRM-0184) [§ 5.59]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



**MOTION TO RELEASE FROM CUSTODY FOR  
FAILURE TO COMPLY WITH WIS. STAT. § 938.205<sup>[9]</sup>**

---

1. (Juvenile's name), by *(his) (her)* attorney, moves the court for an order releasing *(him) (her)* from custody.

2. The grounds for this motion are as follows.

a. (Juvenile's name)'s continued detention violates the conditions set forth in [Wis. Stat. § 938.205](#).

b. [Wis. Stat. § 938.205\(1\)](#) requires probable cause to believe that the juvenile is within the jurisdiction of the court AND probable cause to believe *one* of the following:

(1) That the juvenile will:

- (a) commit injury to others, or
- (b) commit injury to the property of others; OR

(2) That the parent, guardian, or legal custodian of the juvenile, or other responsible adult is:

- (a) unavailable to provide adequate supervision and care,
- (b) neglecting to provide adequate supervision and care,
- (c) refusing to provide adequate supervision and care, or
- (d) unable to provide adequate supervision and care

and that services to ensure the juvenile's safety and well-being are not available or would be inadequate; OR

(3) That the juvenile will run away or be taken away so as to be unavailable for:

- (a) proceedings of the court or its officers, or
- (b) proceedings of the division of hearings and appeals.

c. At the custody hearing on (date), it was alleged that (juvenile's name) (describe allegations), which would bring (juvenile's name) within the jurisdiction of the court.

However, no threats by (juvenile's name) to harm others or their property were alleged on the record so as to support probable cause that (juvenile's name) would do so.

Furthermore, no allegations were included in the record to support probable cause that (name of juvenile's parent, guardian or legal custodian, or other responsible adult) was unavailable, neglecting, refusing, or unable to provide adequate supervision and care.

Finally, no allegations were included in the record to support probable cause that (juvenile's name) would run away or be taken away so as to be unavailable for court proceedings. There were no allegations that (juvenile's name) had ever run away from any court proceedings.

WHEREFORE, (juvenile's name) requests immediate release from physical custody because probable cause with respect to the criteria specifically outlined in [Wis. Stat. § 938.205](#) was not established.

This motion is made subject to objection to the jurisdiction of the court.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

## **XI. [Standard Juvenile Court Forms](#)**

## [§ 5.60]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose   |
|-------------------------|---------------------------|---|---|
| <a href="#">IW-1711</a> | Both                      | Order for temporary physical custody—secure/nonsecure—Indian Child Welfare Act                | Court order directing custody ordered by the court in out-of-home placement for a child who is subject to ICWA  |
| <a href="#">JC-1608</a> | Ch. 48                    | Temporary physical custody request—Ch. 48   | Request for custody and custody decision by intake worker in a Wis. Stat. ch. 48 proceeding   |
| <a href="#">JD-1609</a> | Ch. 48                    | Temporary physical custody request supplement—Ch. 48  | Form to provide additional information to the court when requesting temporary physical custody of a child in a Wis. Stat. ch. 48 proceeding                                     |
| <a href="#">JD-1703</a> | Ch. 938                   | Request for custody by school attendance officer/designation by school district administrator | Request to take a truant juvenile into custody  |
| <a href="#">JD-1710</a> | Ch. 938                   | Temporary physical custody request—Ch. 938  | Request for custody and custody decision by intake worker in a Wis. Stat. ch. 938 proceeding  |
| <a href="#">JD-1711</a> | Both                      | Order for temporary physical custody (secure/nonsecure)                                       | Court order directing custody ordered by the court for a child  |
| <a href="#">JD-1712</a> | Both                      | Waiver of participation in nonsecure physical custody hearing                                 | Child's or parent's waiver of a physical custody hearing to challenge or review nonsecure placement   |
| <a href="#">JD-1770</a> | Ch. 938                   | Short term detention—pending investigation/as a consequence                                   | Document authorizing custody hold of juvenile pending investigation of an alleged violation of a dispositional order or as a consequence for violation of a dispositional order |

## Supplement Chapter 6

### Intake Inquiry



Book sections supplemented: [6.1](#), [6.3](#), and [6.37](#)

## 6.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272.

## 6.3 [What Is an Intake Inquiry?] Purpose

[Page 2: Added textual sentence and citation to end of second paragraph in section](#)

Intake is one of the most important stages in juvenile proceedings. The Juvenile Justice Code has as one of its goals diversion through early intervention, when consistent with the protection of the public. [Wis. Stat.](#) § 938.01(2)(e). The intake worker, working on behalf of the juvenile court, makes the initial determination whether to divert a case, handle it informally, or refer it for the filing of a formal petition. The consideration of options other than a formal petition is in line with the ongoing movement to divert youth out of the juvenile justice system. See Richard Mendel, The Sentencing Project, *Protect and Redirect: America's Growing Movement to Divert Youth out of the Justice System* (Mar. 2024), <https://www.sentencingproject.org/app/uploads/2024/03/Protect-and-Redirect-Americas-Growing-Movement-to-Divert-Youth-Out-of-the-Justice-System.pdf>.

### 6.37 [Challenges to Intake Recommendation] [By Defense Counsel] Erroneous Termination of Informal Disposition or Deferred Prosecution Agreement for Noncompliance

[Page 15: Added textual sentence and citation to end of first paragraph after Note in section](#)

Although Wisconsin courts have not decided this due-process issue, at least one other state court has. The Washington Supreme Court has held that the due-process rights afforded defendants in parole and probation revocation proceedings apply equally to deferred prosecution agreements. Those rights include the right to have the agreement administered equitably “with full protection of the constitutional rights relinquished in the bargain.” *State v. Marino*, [674 P.2d 171](#), 174–75 (Wash. 1984). (Unlike [Wis. Stat.](#) § 48.245 or [Wis. Stat.](#) § 938.245, Washington’s deferred prosecution statute requires a court order to rescind the agreement. The *Marino* court acknowledged, however, that, regardless of the specific statutory language, the theory of deferred prosecution “entails more than the charging function and does not fall solely within prosecutorial discretion.” *Id.* at 173.) Therefore, due process requires granting a defendant a hearing for a judicial determination about whether the defendant failed to comply with the agreement. *Id.* at 175. The *Marino* decision has been overruled in part on other grounds, but due process is seen as requiring “an independent determination that the deferred prosecution agreement was violated.” See *State v. Walker*, [No. 56472-6-II](#), [2023 WL 212597](#), at \*5 (Wash. Ct. App. Jan. 17, 2023) (unpublished) (noting that *Marino* was overruled in part on other grounds by *State v. Dent*, [869 P.2d 392](#) (Wash. 1994)).

## Chapter 6

## Intake Inquiry

### I. [Scope of Chapter](#)

#### [§ 6.1]

This chapter discusses the intake worker’s investigation to determine, in delinquency and nondelinquency cases, whether to request that the state or county prosecutor file a petition under either [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938. This intake inquiry shares some characteristics with the intake review that occurs when a child or expectant mother is being held in custody. In both the inquiry and the review, for example, the intake worker must determine the truth of the allegations. In a custody review, however, the intake worker focuses

on determining whether to release the child or expectant mother pending juvenile court proceedings. *See generally supra* [ch. 5](#) (physical custody). The intake inquiry, which is the subject of this chapter, focuses on determining whether to initiate juvenile proceedings and what type of proceedings to initiate, given the facts of the case and the best interests of the child or unborn child and the public.<sup>1</sup>

## II. What Is an Intake Inquiry? [§ 6.2]

### A. Purpose

#### [§ 6.3]

Generally, the intake inquiry consists of an investigation conducted by the intake worker after receiving information that a child should be referred to the court as (1) delinquent, (2) in need of protection or services, (3) in violation of a civil law, or (4) in violation of a county, town, or municipal ordinance, [Wis. Stat.](#) §§ 48.24(1), 938.24(1), or that an unborn child should be referred to the court as in need of protection or services, [Wis. Stat.](#) § 48.24(1). Truancy cases and citations issued to juveniles 12 years old or older for county, town, or municipal violations do not require investigation by the intake worker. [Wis. Stat.](#) §§ 938.24(1), 938.17(2). Because the juvenile court and the municipal court have concurrent jurisdiction over many of these types of violations, the law enforcement officer has the discretion either to issue a citation (heard by the municipal court) or to refer the case to intake. [Wis. Stat.](#) §§ 938.125, 938.17(2); *see supra* [ch. 4](#) (jurisdiction and venue). *But see* [Wis. Stat.](#) § 938.17(2)(a)1m. (providing municipal courts with exclusive jurisdiction over municipal traffic ordinance violations committed by juveniles 12–15 years of age).

Intake is one of the most important stages in juvenile proceedings. The Juvenile Justice Code has as one of its goals diversion through early intervention, when consistent with the protection of the public. [Wis. Stat.](#) § 938.01(2)(e). The intake worker, working on behalf of the juvenile court, makes the initial determination whether to divert a case, handle it informally, or refer it for the filing of a formal petition.

Through investigation, the intake worker must first determine whether the available facts establish prima facie jurisdiction: If true, do the allegations establish the jurisdiction of the juvenile court? *See supra* [ch. 4](#) (jurisdiction and venue). If so, does sufficient evidence support the allegations? Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 5.3 (2d ed. 1983).

**Comment.** The Wisconsin Court of Appeals has noted that the intake worker does not have responsibility for investigating a juvenile’s alleged crime. In *J.W.T. v. State (In the Interest of J.W.T.)*, 159 Wis. 2d 754, 762, 465 N.W.2d 520 (Ct. App. 1990), the court explained that because the district attorney makes the final decision whether to file a petition, the intake worker’s investigation does not involve determining whether a basis exists for the allegations. (*J.W.T.*, however, concerned an issue about the 40-day deadline for the intake worker’s recommendation; the case did not concern the standard for determining whether sufficient evidence supported the allegation.) This narrow view of the intake worker’s role fails to acknowledge the need for some investigation of the charges to determine whether the juvenile court has jurisdiction and what disposition is appropriate. (Obviously, the recommended disposition for a retail theft might be different from one for an armed robbery.) Moreover, it seems the prosecutor cannot overrule the intake worker’s decision either to close the case or to enter into a deferred prosecution agreement in a juvenile in need of protection or services (JIPS) case, because the statute refers to only the prosecutor overruling the decision in delinquency proceedings. [Wis. Stat.](#) § 938.24(5). These decisions require the intake worker to determine the truth of the allegations. The court of appeals has even noted that a “full and complete investigation” at this stage serves the best interests of the child. *J.L.W. v. Waukesha Cnty. (In re J.L.W.)*, 143 Wis. 2d 126, 132, 420 N.W.2d 398 (Ct. App. 1988).

The statutes are silent as to the standard of proof required for the intake worker to determine whether sufficient evidence supports the allegation. In adult criminal cases, although an arrest warrant can issue only upon probable cause, that standard does not necessarily determine the quantum of evidence required for charging. “As a practical matter, the prosecutor is likely to require admissible evidence showing a high probability of guilt, that is, sufficient evidence to justify confidence in obtaining a conviction.” *See generally* 4 Wayne R. LaFave et al., *Criminal Procedure* ch. 13 (4th ed. 2015). If discretion at the intake stage is “analogous to prosecutorial discretion in the criminal justice system,” then the standard used by the intake worker to determine whether sufficient evidence exists to support the allegations in delinquency, JIPS, children in need of protection or services (CHIPS), and unborn children in need of protection or services (UCHIPS) cases might be whether the evidence suffices to justify confidence in obtaining an adjudication. *See* Melli & Hirsch, *supra*, § 5.2.

Just as a prosecutor might decide not to charge even when sufficient evidence supports a charge, the intake worker’s second determination concerns which recommendation serves the best interests of the child or unborn child and the public, a determination not limited to a simple dichotomy of either filing or not filing a formal petition. [Wis. Stat.](#) §§ 48.24(1), 938.24(1).

### B. Procedure [§ 6.4]

The referral of a juvenile case to the intake worker can occur in one of several ways. In cases of suspected abuse or neglect, the child-abuse reporting law requires the county department to “initiate a diligent investigation” within 24 hours after receiving a complaint to determine whether the child or unborn child is in need of protection or services. [Wis. Stat.](#) § 48.981(3)(c)1.a., b. (Certain counties, selected by the Wisconsin Department of Children and Families (DCF) to participate in a pilot program, can employ alternative responses to reports of abuse or neglect or of threatened abuse or neglect. *See* [Wis. Stat.](#) § 48.981(3m).) The intake worker initiates the investigation. In a nondelinquency case, a parent, guardian, legal custodian, child, expectant mother, or other interested party can seek services from the department and, consequently, from the intake worker. In potential delinquency cases, the law enforcement agency involved in investigation of the case makes the referral.

The intake worker must conduct the intake inquiry in accordance with local intake rules promulgated under [Wis. Stat.](#) § 48.06(1) or (2) or under [Wis. Stat.](#) § 938.06(1) or (2). As part of the investigation, the intake worker conducts intake conferences, with notice to the child, expectant mother, parent, guardian, and legal custodian. [Wis. Stat.](#) §§ 48.24(2)(a), 938.24(2)(a). The intake worker cannot, however, compel any child or other person to appear at any conference, participate in a multidisciplinary screen, produce any papers, or visit any place. [Wis. Stat.](#) §§ 48.24(2)(b), 938.24(2)(b). Under [Wis. Stat.](#) §§ 48.06(2)(a) and 938.06(2)(a), the county board of supervisors must authorize the county department of health and family services or the court (or both) to provide intake services. In Milwaukee County, the county board of supervisors must operate a children’s court center under the supervision of a director to provide intake services for cases under [Wis. Stat.](#) ch. 938, *see* [Wis. Stat.](#) § 938.06(1)(a)1.; the DCF must provide the Milwaukee County Circuit Court with intake services for cases under [Wis. Stat.](#) ch. 48, *see* [Wis. Stat.](#) § 48.06(1)(a)1. *See also supra* [ch. 3](#) (role of intake worker).

### C. Multidisciplinary Screen [§ 6.5]

Some counties have a program or pilot program for determining whether a child needs alcohol or other drug abuse assessment. *See* [Wis. Stat.](#) §§ 48.547, 938.547. For those counties that do have this type of program, the intake worker *must* conduct a multidisciplinary screen for the following:

1. Any juvenile alleged to have committed a violation under [Wis. Stat.](#) ch. 961, the Uniform Controlled Substances Act, [Wis. Stat.](#) § 938.24(2m)(a)1.;
2. Any child alleged delinquent or in need of protection or services who has at least two prior adjudications for underage drinking violations under [Wis. Stat.](#) § 125.07(4)(a) or (b), 125.085(3)(b), or 125.09(2), or under any local ordinance strictly conforming to any of those statutory provisions, [Wis. Stat.](#) §§ 48.24(2m)(a)2., 938.24(2m)(a)2.;
3. Any juvenile alleged to have committed an offense to purchase alcohol or controlled substances, [Wis. Stat.](#) § 938.24(2m)(a)3.;
4. Any child 12 years old or older who requests and consents to a multidisciplinary screen, [Wis. Stat.](#) §§ 48.24(2m)(a)4., 938.24(2m)(a)4.;
5. Any child who consents to a multidisciplinary screen requested by the child’s parents, [Wis. Stat.](#) §§ 48.24(2m)(a)5., 938.24(2m)(a)5.;
- and
6. Any expectant mother 12 years old or older who requests and consents to a multidisciplinary screen, [Wis. Stat.](#) § 48.24(2m)(a)6.

In addition, in such counties, the intake worker can conduct a multidisciplinary screen for any other reason. [Wis. Stat.](#) §§ 48.24(2m)(b), 938.24(2m)(b).

### III. Notice and Appraisal of Rights [§ 6.6]

Before meeting with parents, expectant mothers, or children during an intake inquiry, the intake worker must provide certain information to the following persons:

1. Juveniles alleged to be delinquent;
2. Juveniles 10 years old or older and parents who are the focus of an inquiry regarding the need for protection or services under [Wis. Stat.](#) ch. 938 (JIPS); and
3. Parents, expectant mothers, and children 12 years old or older who are the focus of an inquiry regarding the need for protection or services under [Wis. Stat.](#) ch. 48 (CHIPS or UCHIPS).

[Wis. Stat.](#) §§ 48.243(1), 938.243(1).

The intake worker must provide notice that the referral might result in the filing of a formal petition and must explain the allegations that the petition could contain and the nature and possible consequences of the proceedings. [Wis. Stat.](#) §§ 48.243(1)(a), (b), 938.243(1)(ag), (am), (b). Possible consequences include those identified in [Wis. Stat.](#) § 938.17, as well as waiver into adult court under [Wis. Stat.](#) § 938.18. [Wis. Stat.](#) § 938.17 governs the jurisdiction of adult courts over certain traffic, boating, snowmobile, all-terrain vehicle, utility terrain vehicle, and limited-use off-highway motorcycle violations and the concurrent jurisdiction of the juvenile court with municipal courts over civil-law and ordinance violations. Municipal courts have exclusive jurisdiction, however, over municipal-traffic-ordinance violations committed by juveniles 12–15 years of age. [Wis. Stat.](#) § 938.17(2)(a)1m. *See also generally supra* [ch. 4](#) (jurisdiction and venue).

The intake worker must also advise parents, expectant mothers, and children of the following rights:

1. The right to remain silent;
2. The right to confront and cross-examine witnesses;
3. The right to counsel;
4. The right to present and subpoena witnesses;
5. The right to a jury trial in CHIPS and UCHIPS cases; and
6. The right to have the allegations of the petition proved by clear and convincing evidence unless the juvenile is alleged to be delinquent under [Wis. Stat.](#) § 938.12 or 938.13(12), in which case the prosecutor bears the burden of proof beyond a reasonable doubt.

[Wis. Stat.](#) §§ 48.243(1)(c)–(h), 938.243(1)(c)–(h).

If the juvenile allegedly committed an act resulting in personal injury or damage to, or loss of, the property of another, the intake worker must also inform the juvenile’s parents *in writing* that the identity of the juvenile and the parent, the juvenile’s police records, and the outcome of proceedings against the juvenile can be disclosed for use in civil actions for damages. [Wis. Stat.](#) § 938.243(1m). *See also* [Wis. Stat.](#) §§ 938.346 and 938.396(1)(c)5. and 6., which provide for disclosure of information in juvenile records, including a juvenile’s identity, to the victim of the juvenile’s act and to the victim-witness coordinator. The intake worker must also advise the parents of their liability for their child’s acts. [Wis. Stat.](#) § 938.234(1m). [Wis. Stat.](#) § 895.035 imposes liability on parents with custody of an unemancipated minor child for damage to property, for the value of unrecovered stolen property, or for personal injury attributable to a “willful, malicious, or wanton act of the child.”

If a child or an expectant mother held in custody attends a detention hearing, the intake worker need not advise the child, the expectant mother, or the child’s parents of the rights listed above. [Wis. Stat.](#) §§ 48.243(4), 938.243(4). Apparently, this is because the court must advise parents, expectant mothers, and children of their rights at the detention hearing. *See* [Wis. Stat.](#) §§ 48.21(3)(d), 48.213(2)(d), 938.21(2)(c), (3)(d). (This conjecture, however, does not explain why intake workers need not advise parents of their rights and of the consequences of proceedings if only the *child* attended the detention hearing.)

If the child or expectant mother did not have a detention hearing and did not appear at an intake inquiry, the intake worker must advise the child or expectant mother and the parent (and, when appropriate, the guardian or legal custodian) of their rights both orally (in person or by telephone) *and* in writing. [Wis. Stat.](#) §§ 48.243(3), 938.243(3). The intake worker need not do so, however, if the case is resolved by informal disposition or deferred prosecution. *See infra* §§ [6.10–27](#) (informal disposition and deferred prosecution).

**Practice Tip.** The rights under [Wis. Stat.](#) §§ 48.243(1)(c)–(h) and 938.243(1)(c)–(h) include the right to counsel. If possible, counsel should be present and represent children, juveniles, and parents at the intake meeting. This can aid in obtaining informal disposition and deferred prosecution. *See infra* §§ [6.10–27](#).

## IV. Actions of Intake Worker [§ 6.7]

### A. In General [§ 6.8]

For CHIPS and UCHIPS cases, the intake worker must request that a petition be filed, enter into an informal disposition, or close the case within 60 days after receipt of the referral information. [Wis. Stat.](#) § 48.24(5). For delinquency and JIPS cases, the intake worker must request that a petition be filed, enter into a deferred prosecution agreement, or close the case within 40 days after receipt of the referral information. [Wis. Stat.](#) § 938.24(5); *see also Antonio M.C. v. State (In the Int. of Antonio M.C.)*, 182 Wis. 2d 301, 311, 513 N.W.2d 662 (Ct. App. 1994) (holding that “intake worker need only *request* that a delinquency petition be filed if court referral is deemed appropriate”).

## B. Closure of Case [§ 6.9]

If the intake worker determines that the case should be closed, the intake worker has the authority to close the case but must communicate that decision—in writing—to the representative of the interests of the public under [Wis. Stat.](#) §§ 48.09 and 938.09. In delinquency cases, this is the district attorney; in CHIPS, UCHIPS, or JIPS cases, it is either the corporation counsel or the district attorney. *See supra* [ch. 3](#) (Roles of the Parties in Juvenile Court). If a law enforcement officer made a recommendation regarding the child or the unborn child and the unborn child’s expectant mother, the intake worker must also forward the recommendation to the prosecutor. [Wis. Stat.](#) §§ 48.24(5), 938.24(5). In delinquency cases, *see* [Wis. Stat.](#) § 938.12, and JIPS-delinquency cases, *see* [Wis. Stat.](#) § 938.13(12), the intake worker must make a reasonable attempt to inform all known victims of the juvenile’s act that the case is being closed. [Wis. Stat.](#) § 938.24(5m).

## C. Informal Disposition and Deferred Prosecution [§ 6.10]

### 1. Criteria [§ 6.11]

Informal dispositions, used in cases falling under [Wis. Stat.](#) ch. 48, and deferred prosecution agreements, used in cases falling under [Wis. Stat.](#) ch. 938, are written agreements between the intake worker and all parties.

The intake worker can enter into an informal disposition if three conditions apply. First, the intake worker must determine that neither the interests of the child or unborn child nor the interest of the public requires the filing of a CHIPS or UCHIPS petition or any other petition authorized under [Wis. Stat.](#) § 48.14. ([Wis. Stat.](#) § 48.14 provides for juvenile court jurisdiction over other matters, such as termination of parental rights.) Second, the facts must persuade the intake worker that if jurisdiction of the court were sought, it would exist. Finally, the parent, legal custodian, or guardian and the child or child expectant mother (if 12 years old or older), or the adult expectant mother, must consent to the informal disposition. [Wis. Stat.](#) § 48.245(1).

Similarly, the intake worker can enter into a deferred prosecution agreement if three conditions are met. First, the intake worker must determine that neither the interest of the juvenile nor the interest of the public requires filing a JIPS or delinquency petition or any other petition authorized under [Wis. Stat.](#) § 938.14. ([Wis. Stat.](#) § 938.14 provides for juvenile court jurisdiction over proceedings under the Interstate Compact for Juveniles, [Wis. Stat.](#) § 938.999.) Second, the facts must persuade the intake worker that if jurisdiction of the court were sought, it would exist. Finally, the juvenile, parent, guardian, and legal custodian must consent to the deferred prosecution agreement. [Wis. Stat.](#) § 938.245(1).

### 2. Terms of Informal Disposition or Deferred Prosecution Agreement [§ 6.12]

#### a. In General [§ 6.13]

In cases under [Wis. Stat.](#) ch. 48, the intake worker must inform the parent, legal custodian, or guardian and the child or child expectant mother (if 12 years old or older), or the adult expectant mother, *in writing* of their right to terminate the informal disposition at any time or object at any time to the fact or terms of the informal disposition. [Wis. Stat.](#) § 48.245(4). In cases under [Wis. Stat.](#) ch. 938, the intake worker must inform the juvenile and the juvenile’s parent, guardian, or legal custodian *in writing* of their right to terminate the deferred prosecution agreement at any time or to object at any time to the fact or terms of the deferred prosecution agreement. [Wis. Stat.](#) § 938.245(4). Under both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, if there is an objection, the intake worker can alter the terms of the informal disposition or deferred prosecution agreement or can request the district attorney or corporation counsel to file a petition.

Before entering into a deferred prosecution agreement in delinquency and JIPS-delinquency cases, the intake worker must offer to all victims of the juvenile’s act an opportunity to confer with the intake worker about the deferred prosecution agreement. [Wis. Stat.](#) § 938.245(1m). Such an offer to confer with the intake worker must be made to only those victims who have requested the opportunity to confer. *Id.* The duty to confer does not limit the intake worker’s obligation to perform other responsibilities *Id.*



The informal disposition or deferred prosecution agreement can require compliance with obligations tending to ensure the child's rehabilitation, protection, or care or compliance with obligations tending to ensure the protection or care of the unborn child and the rehabilitation of the expectant mother. [Wis. Stat.](#) §§ 48.245(2)(a)2., 938.245(2)(a)2.

### **b. Counseling or Diversion [§ 6.14]**

An informal disposition can provide that the child appear with a parent, guardian, or legal custodian for counseling and advice or that the adult expectant mother appear for counseling and advice. [Wis. Stat.](#) § 48.245(2)(a)1. A deferred prosecution agreement can provide that the juvenile and his or her parent, guardian, or legal custodian participate in individual, family, or group counseling and that the parent, guardian, or legal custodian participate in parenting skills training. [Wis. Stat.](#) § 938.245(2)(a)1.

An informal disposition or deferred prosecution agreement can require the child and the child's parent to seek the assistance of a social service agency to which the intake worker refers them. Melli & Hirsch, *supra* § 6.3, § 5.9. Diverting cases to the appropriate agency for the provision of services constitutes one of the most important functions of the intake inquiry. *Id.*

### **c. Drug and Alcohol Assessment and Treatment [§ 6.15]**

The informal disposition or deferred prosecution agreement can provide that the child or expectant mother submit to a drug and alcohol assessment conforming to the criteria of [Wis. Stat.](#) § 48.547(4) or 938.547(4), provided that an approved treatment facility conducts the assessment. ([Wis. Stat.](#) §§ 48.547 and 938.547 govern multidisciplinary screens. *See supra* § 6.5.) [Wis. Stat.](#) §§ 48.245(2)(a)3. and 938.245(2)(a)3. define an *alcohol or other drug abuse assessment* as an evaluation that conforms to the criteria in [Wis. Stat.](#) § 48.547(4) or 938.547(4) and that examines the child's use of alcohol beverages or controlled substances and any medical, personal, family, or social effects caused by its use. An informal disposition or deferred prosecution agreement can include this condition only if the multidisciplinary screen completed by the intake worker under [Wis. Stat.](#) § 48.24(2) or 938.24(2) showed that the child or expectant mother is at risk of having needs and problems resulting from drug or alcohol use. [Wis. Stat.](#) §§ 48.245(2)(a)3., 938.245(2)(a)3.; *see also supra* § 6.5.

The informal disposition or deferred prosecution agreement can provide that, if recommended by the assessment, the child or expectant mother participate in drug and alcohol treatment on an outpatient basis or in an education program related to the abuse of alcohol or drugs. [Wis. Stat.](#) §§ 48.245(2)(a)4., 938.245(2)(a)4. An informal disposition cannot include outpatient treatment unless the parent, legal custodian, or guardian and the child (if 12 years old or older), or the adult expectant mother, executes an informed consent form indicating that they or she knowingly and voluntarily enters into the agreement with this specific provision. [Wis. Stat.](#) § 48.245(2)(c). A deferred prosecution agreement cannot include outpatient treatment unless the juvenile and the juvenile's parent, legal custodian, or guardian execute an informed consent form indicating that they knowingly and voluntarily enter into the agreement with this specific provision. [Wis. Stat.](#) § 938.245(2)(c).

### **d. Restitution [§ 6.16]**

A deferred prosecution agreement can provide that a juvenile participate in a restitution project if the act for which the deferred prosecution agreement is imposed has resulted in (1) damage to the property of another or (2) actual physical injury to another. [Wis. Stat.](#) § 938.245(2)(a)5.a. The restitution cannot include amounts attributable to the victim's pain and suffering. *Id.*

A juvenile under 14 years of age who participates in a restitution project provided by the county can be employed or perform any duties under any circumstances allowed under [Wis. Stat.](#) ch. 103 for children 14 or 15 years old. [Wis. Stat.](#) § 938.245(2)(a)5.b. [Wis. Stat.](#) ch. 103 regulates employment, including employment rules regarding children.

The agreement can require the juvenile to repair damage to property (or to make any reasonable restitution for property damage or personal injury), either in the form of cash or, if the victim agrees, through the performance of services for the victim, or both, if the intake worker determines, after taking into account the well-being and needs of the victim, that the requirement will benefit the well-being and behavior of the juvenile. Any such agreement must include a determination that the juvenile alone has the ability to pay or is physically able to perform the services, and can allow for payment or the completion of services until the expiration date of the agreement. [Wis. Stat.](#) § 938.245(2)(a)5.a.

A deferred prosecution agreement cannot require a juvenile under 14 years of age to make more than \$250 in restitution or to perform more than 40 hours of services for the victim. [Wis. Stat.](#) § 938.245(2)(a)5.c.

A deferred prosecution agreement also can provide for the custodial parent to make restitution for damage to property or physical injury to another (excluding pain and suffering). [Wis. Stat.](#) § 938.245(2)(a)5.am. Any amount of restitution ordered to be paid by the parent, except for recovery for retail theft under [Wis. Stat.](#) § 943.51, cannot exceed \$5,000. Any such agreement must also include a finding that the custodial parent is financially able to pay the amount ordered. *Id.* The agreement can allow the parent until the expiration of the deferred prosecution agreement to pay the restitution, and any amount of restitution paid by the juvenile under [Wis. Stat.](#) § 938.245(2)(a)5.a. will offset the amount ordered to be paid by the parent. *Id.*

### **e. Supervised Work Program or Other Community Service Work [§ 6.17]**

A deferred prosecution agreement can provide that a juvenile participate in a supervised work program or other community service work. [Wis. Stat.](#) § 938.245(2)(a)6.

A supervised work program provides the juvenile with work in exchange for reasonable compensation (reflecting the reasonable market value of the work performed) or with uncompensated community service work. [Wis. Stat.](#) § 938.34(5g)(am). The county department, as defined in [Wis. Stat.](#) § 938.02(2g), or a community agency approved by the court must administer the program. [Wis. Stat.](#) § 938.34(5g)(a).

Community service work is administered by a public agency or nonprofit charitable organization approved by the court. *Id.* A juvenile can perform community service work in lieu of restitution if both the agency administering the work and the person owed the restitution agree. The court can use any available resources, including any community service work program, in ordering the juvenile to perform community service work. [Wis. Stat.](#) § 938.34(5g)(am).

The supervised work program or other community service work must

1. Be “constructive,”
2. Promote the juvenile’s rehabilitation,
3. Be age appropriate,
4. Be appropriate for the juvenile’s physical ability, and
5. Be combined with counseling.

[Wis. Stat.](#) § 938.34(5g)(b).

The program cannot conflict with the juvenile’s school schedule. *Id.* The amount of work required must bear a reasonable relationship to the seriousness of the offense. *Id.*

A juvenile under 14 years of age who participates in a supervised work project or other community service work can be employed or perform any duties under any circumstances allowed under [Wis. Stat.](#) ch. 103 for children 14 or 15 years old. [Wis. Stat.](#) § 938.34(5g)(c).

A deferred prosecution agreement cannot require a juvenile under 14 years of age to perform more than 40 total hours of supervised or other community service work. [Wis. Stat.](#) § 938.34(5g)(d). If a juvenile 10 years of age or older has allegedly committed an act of graffiti in violation of [Wis. Stat.](#) § 943.017, the juvenile can be required to perform between 10 and 100 hours in a supervised work program or other community service work, but if the juvenile is under 14 years of age, the juvenile cannot be required to perform more than 40 hours of work. [Wis. Stat.](#) § 938.245(2g).

### **f. Volunteers in Probation [§ 6.18]**

A volunteers in probation program provides supervision of an individual by a volunteer. [Wis. Stat.](#) § 973.11. For a juvenile alleged to have committed a misdemeanor, a deferred prosecution agreement can provide for the juvenile’s placement with a volunteers in probation program (with reasonable and appropriate conditions set by the intake worker) if the intake worker determines that the program would benefit the juvenile and the community. [Wis. Stat.](#) § 938.245(2)(a)7. This option applies only if a program has been established in the juvenile’s county of residence.

Conditions of probation can include a request that the volunteer provide the juvenile with a role model, informal counseling, and monitoring. *Id.*



### g. Teen Court Program [§ 6.19]

If a juvenile allegedly committed a misdemeanor or a civil law or ordinance violation, the juvenile can be placed in a teen court program. [Wis. Stat.](#) § 938.245(2)(a)8.b. The option of placement in a teen court program exists only if a program has been approved and established in the county of residence. [Wis. Stat.](#) § 938.245(2)(a)8.a. For a juvenile to participate, the intake worker must determine that participation in the program will benefit the juvenile and the community, and the juvenile must admit to the intake worker (in the presence of the juvenile's parent, guardian, or legal custodian) that the juvenile committed the alleged delinquent act or civil-law or ordinance violation. [Wis. Stat.](#) § 938.245(2)(a)8.a., c. The juvenile cannot participate in the program if the juvenile successfully completed the program in the two years preceding the alleged delinquent act or civil-law or ordinance violation. [Wis. Stat.](#) § 938.245(2)(a)8.d.

### h. Youth Report Centers [§ 6.20]

A deferred prosecution agreement can also require that a juvenile report to a youth report center after school, in the evening, on weekends, on other non-school days, or at any other time that the juvenile is not under immediate adult supervision. At the designated times, the juvenile must participate in the center's social, behavioral, academic, community service, and other programming. [Wis. Stat.](#) § 938.245(2)(a)9m.

### i. Parents' Attendance at School [§ 6.21]

If the deferred prosecution agreement is based on an allegation that the juvenile violated a municipal ordinance prohibiting habitual truancy, *see* [Wis. Stat.](#) § 118.163(2), such an agreement can require that the juvenile's parent, guardian, or legal custodian attend school with the juvenile. [Wis. Stat.](#) § 938.245(2v).

### j. Exclusions [§ 6.22]

Informal dispositions and deferred prosecution agreements cannot include any form of out-of-home placement. [Wis. Stat.](#) §§ 48.245(2)(b), 938.245(2)(b). An informal disposition cannot exceed six months. [Wis. Stat.](#) § 48.245(2)(b). Under [Wis. Stat.](#) § 48.245(2r), an informal disposition can be extended for up to an additional six months after written notice is given to the following: the child, the child's parent, guardian, and legal custodian, and their counsel; the child expectant mother, her parent, guardian, and legal custodian, and their counsel; and the adult expectant child and her counsel. If the parent, guardian, legal custodian, child or child expectant mother (if 12 years old or older), or adult expectant mother objects to the extension, the intake worker may recommend to the district attorney or corporation counsel that a CHIPS or UCHIPS petition be filed. An extension relating to an unborn child can be granted after the child is born. [Wis. Stat.](#) § 48.245(2r). If the informal disposition provides for drug or alcohol treatment, *see supra* § 6.15, the parent, legal custodian, or guardian and the child (if 12 years old or older), or the adult expectant mother, must execute an informed consent form indicating that they or she has voluntarily and knowingly entered into an informal disposition for the provision of those services. [Wis. Stat.](#) § 48.245(2)(c). For the consent to be informed (i.e., knowing and voluntary), the agreement should include an explicit statement that the child and parent or the adult expectant mother understands the consequences of noncompliance with treatment.

A deferred prosecution agreement cannot exceed one year. [Wis. Stat.](#) § 938.245(2)(b). If the deferred prosecution agreement provides for drug or alcohol treatment, the juvenile and the juvenile's parent, legal custodian, or guardian must execute an informed consent form indicating that they have voluntarily and knowingly entered into a deferred prosecution agreement for the provision of those services. [Wis. Stat.](#) § 938.245(2)(c).

## 3. Termination of Informal Disposition or Deferred Prosecution Agreement [§ 6.23]

### a. Voluntary [§ 6.24]

An informal disposition *must* terminate upon the request of the child or child expectant mother (if 12 years old or older), the parent, guardian, or legal custodian, or the adult expectant mother. [Wis. Stat.](#) § 48.245(5). A deferred prosecution agreement, however, can—but need not—terminate upon the request of the juvenile, parent, guardian, or legal custodian. [Wis. Stat.](#) § 938.245(5). Once the informal disposition or deferred prosecution agreement has been terminated, the intake worker can request the district attorney or corporation counsel to file a petition. [Wis. Stat.](#) §§ 48.245(4), 938.245(4); *see infra* § 6.28 (referral for filing of petition).

### b. Noncompliance [§ 6.25]

If the intake worker determines that obligations under an informal disposition have been violated, the intake worker can cancel the agreement. [Wis. Stat.](#) § 48.245(7). (See sections [6.31–37](#), *infra*, for a discussion of challenges defense counsel can make to an intake worker’s determination that a child has not complied with the terms of an informal disposition or deferred prosecution agreement.) Within 10 days after cancellation, the intake worker must notify the prosecutor and can request that a petition be filed. The prosecutor must then file a petition or close the case within 20 days after the date of the notice. The petition may include information received before the effective date of the informal disposition, as well as information received during the period of the informal disposition, including information indicating that a party has not met the obligations imposed under the informal disposition, to provide a basis for giving the court jurisdiction. The court must grant appropriate relief as provided in [Wis. Stat.](#) § 48.315(3) with respect to any petition that is not filed within the 20 day. Failure to object to the fact that a petition is not filed within the specified time period waives any objection to the court’s competency to act on the petition. *Id.*

If the intake worker determines that obligations under a deferred prosecution agreement have been violated, the intake worker can cancel the agreement. Within 10 days after cancellation, the intake worker must notify the prosecutor and can request that a petition be filed. In delinquency cases, the district attorney can file a petition within 20 days after the date of the cancellation notice, regardless of whether the intake worker has requested that a petition be filed. The court must grant appropriate relief as provided in [Wis. Stat.](#) § 938.315(3) with respect to any petition that is not filed within the 20-day period. Failure to object to the fact that a petition is not filed within the specified time period waives any objection to the court’s competency to act on the petition. [Wis. Stat.](#) § 938.245(7)(a); *see infra* § [6.30](#) (challenges by state to intake request).

The intake worker may cancel a deferred prosecution agreement because the juvenile’s parent, guardian, or legal custodian has not met the obligations imposed under the agreement. [Wis. Stat.](#) § 938.245(7)(b). Under such circumstances, if the intake worker cancels the agreement, the intake worker must request that the prosecutor file a petition seeking that the court order the juvenile’s parent, guardian, or legal custodian to show good cause for not meeting the obligations. *Id.* If the prosecutor files a petition and if the court finds prosecutive merit for the petition, the court must hold a hearing at which the parent, guardian, or legal custodian must show good cause for failing to meet the obligations in the agreement. If the parent, guardian, or legal custodian fails to show good cause, the court can impose a forfeiture of as much as \$1,000. *Id.*

### c. Compliance [§ 6.26]

If the conditions of the informal disposition or deferred prosecution agreement have been met, the intake worker must so advise the child, the expectant mother, the child’s or child expectant mother’s parent, guardian, or legal custodian, and the unborn child’s guardian ad litem in writing. At that point, no petition can be filed or citation issued for the charges that brought about the informal disposition or deferred prosecution agreement, nor can the charges be the sole basis for a petition under [Wis. Stat.](#) §§ 48.13–48.14, 938.13, or 938.14. [Wis. Stat.](#) §§ 48.245(8), 938.245(8).

### d. Filing of Petition [§ 6.27]

A deferred prosecution agreement arising from a delinquent act terminates if the district attorney files a delinquency petition within 20 days after receipt of the deferred prosecution agreement. [Wis. Stat.](#) § 938.245(6). Likewise, an informal disposition in a CHIPS or UCHIPS matter terminates if the district attorney or corporation counsel files a petition within 20 days after receipt of the informal disposition. [Wis. Stat.](#) § 48.245(5m).

## D. Referral for Filing of Petition [§ 6.28]

The intake worker can request the filing of a petition. [Wis. Stat.](#) §§ 48.24(5), 938.24(5); *see infra* [ch. 7](#) (filing of petition).

## V. Challenges to Intake Recommendation [§ 6.29]

### A. By State or County [§ 6.30]

When a juvenile allegedly committed a delinquent act and the intake worker decides to close the case or handle it with a deferred prosecution agreement, the district attorney can ignore this decision and file a delinquency petition, but only if the district attorney does so within 20 days after receiving notice that the intake worker has closed the case or made a deferred prosecution agreement. [Wis. Stat.](#) § 938.24(5). The district attorney does not have the option of overruling the intake worker’s decision in JIPS cases, however. *See id.*

In CHIPS and UCHIPS cases, the district attorney or corporation counsel can file a petition within 20 days after receiving notice that the intake worker entered into an informal disposition. [Wis. Stat. § 48.245\(5m\)](#).

If a deferred prosecution agreement terminates because the district attorney timely files a petition, any statements made to the intake worker during the intake interview are inadmissible. [Wis. Stat. § 938.245\(6\)](#). Such statements are admissible, however, in the case of an informal disposition. See [Wis. Stat. § 48.245\(5m\)](#); 2007 Wis. Act 199.

## B. By Defense Counsel [§ 6.31]

### 1. In General [§ 6.32]

Usually, defense counsel does not enter the case until a decision has been made to file a petition. See *supra* [ch. 3](#) (role of the defense attorney). Once a petition has been filed, defense counsel raises any challenges to the jurisdiction of the court or the sufficiency of the allegations in the petition. See [chapters 7](#) and [8, infra](#), for discussions of challenges to the petition at the plea hearing.

### 2. Violation of 60-Day Time Period for CHIPS and UCHIPS Cases and Violation of 40-Day Time Period for JIPS and Delinquency Cases [§ 6.33]

#### a. In General [§ 6.34]

Within 60 days of receiving referral information in a CHIPS or UCHIPS case, the intake worker must close the case, handle the case by informal disposition, or request that a petition be filed. [Wis. Stat. § 48.24\(5\)](#); see also *supra* §§ [6.7–28](#). The court must grant appropriate relief as provided in [Wis. Stat. § 48.315\(3\)](#) with respect to any petition that is not referred within the 60-day period. Failure to object to the fact that a petition is not referred within the specified time period waives any objection to the court’s competency to act on the petition.

For JIPS and delinquency cases, the intake worker has only 40 days after receiving referral information to close the case, handle the case by deferred prosecution agreement, or request that a petition be filed. The court must grant appropriate relief as provided in [Wis. Stat. § 938.315\(3\)](#) with respect to any petition that is not referred within the 40-day period. [Wis. Stat. § 938.24\(5\)](#); see also [Wis. Stat. § 938.315\(3\)](#). Failure to object to the fact that a petition is not filed within the specified time period waives any objection to the court’s competency to act on the petition. [Wis. Stat. §§ 938.24\(5\), 938.315\(3\)](#).

The Wisconsin Court of Appeals has held that the date on which a report of suspected child abuse is referred to the county department and the intake worker is the date on which the [Wis. Stat. § 48.24\(5\)](#) time period begins to run. *Sheboygan Cnty. Dep’t of Health & Hum. Servs. v. Jodell G. (In the Int. of Andrea P.B.)*, 2001 WI App 18, 240 Wis. 2d 516, 625 N.W.2d 307. This holding is codified in [Wis. Stat. § 48.24\(5\)](#).

#### b. Police Reports [§ 6.35]

The court of appeals has held that the phrase “information indicating that a child [or unborn child or juvenile] should be referred to the court” means that quantum of evidence needed to allow a reasonable intake worker to evaluate the case. *J.W.T. v. State (In the Int. of J.W.T.)*, 159 Wis. 2d 754, 763, 465 N.W.2d 520 (Ct. App. 1990); see also [Wis. Stat. §§ 48.24\(1\), 938.24\(1\)](#). In *J.W.T.*, the court declined to adopt a bright-line rule that the time periods would begin running only when the intake worker received information (if not the official reports themselves) from the law enforcement agency. The court, however, held that under the facts in *J.W.T.*, the intake worker needed that information to make an evaluation. Therefore, the time periods in *J.W.T.* did not begin running until the intake worker received that information. Key to the decision in *J.W.T.* was proof that the intake worker had diligently attempted to obtain information: the record demonstrated that the worker made numerous phone calls to law enforcement agencies and the district attorney’s office in attempting to track down the necessary information. *J.W.T.*, 159 Wis. 2d at 758–60.

#### c. Referral by Another County [§ 6.36]

Often, an intake worker receives referral information, reviews the case, and determines that the information should go to the county in which the child resides so that the intake worker in that county can review the case. In *J.L.W. v. Waukesha County (In re J.L.W.)*, 143 Wis. 2d 126, 420 N.W.2d 398 (Ct. App. 1988), defense counsel argued that the first intake worker’s receipt of the information triggered the 40-day period and bound the second intake worker. The appellate court disagreed, holding it not unreasonable for the second intake worker to review the case de novo, provided that the second intake worker made a good-faith effort to resolve the case in a timely fashion. *Id.* at

132; *see also* [State v. Everett](#), 231 Wis. 2d 616, 605 N.W.2d 633 (Ct. App. 1999) (holding that when delinquency case is transferred from one county to another, statutory deadlines for intake worker and district attorney begin anew).

**Comment.** The court in *J.L.W.* applied the good-faith standard to the initial determination that venue should lie in the child's county of residence and to the investigation by the second intake worker. Consequently, in this situation, both intake workers must demonstrate a good-faith effort (i.e., diligence in investigating the case for prompt resolution). The court also found that [Wis. Stat. § 48.315](#), which governs continuances in juvenile court proceedings, does not apply to extensions of time for completing the intake inquiry. Rather, [Wis. Stat. § 48.315](#) applies only after a petition has been filed and a party seeks a continuance from the juvenile court. 143 Wis. 2d at 132–33 n.3. While *J.L.W.* was decided before enactment of [Wis. Stat. ch. 938](#), the decision would likewise apply to situations under [Wis. Stat. ch. 938](#) because the language in [Wis. Stat. § 48.315](#) is comparable to the language in [Wis. Stat. § 938.315](#).

### 3. [Erroneous Termination of Informal Disposition or Deferred Prosecution Agreement for Noncompliance](#) [§ 6.37]

Neither the Children's Code nor the Juvenile Justice Code provides a procedure for a hearing on the appropriateness of an intake worker's termination of an informal disposition or deferred prosecution agreement for failure to comply with the conditions of the disposition or agreement. In fact, unlike deferred prosecution agreements in adult criminal cases (which require the district attorney to provide written notice upon termination of an agreement pursuant to [Wis. Stat. § 971.37\(2\)](#)), [Wis. Stat. §§ 48.245](#) and [938.245](#) do not even hint that the prosecutor has any obligation to provide written notice of termination to the child, the expectant mother, the unborn child's guardian ad litem, or the child's parent, guardian, or legal custodian.

At any time, a child or child expectant mother (if 12 years old or older), the parent, guardian, or legal custodian, or an adult expectant mother can request termination of an informal disposition. [Wis. Stat. § 48.245\(5\)](#). The intake worker, however, can terminate an informal disposition only for noncompliance or if the child or child expectant mother (if 12 years old or older), the child's parent, guardian, or legal custodian, or the adult expectant mother has objected to the terms of the informal disposition. [Wis. Stat. § 48.245\(4\)](#), (7). Similarly, at any time, a juvenile or the juvenile's parent, guardian, or legal custodian can request termination of a deferred prosecution agreement. [Wis. Stat. § 938.245\(5\)](#). The intake worker can terminate a deferred prosecution agreement only for noncompliance or if the juvenile or the juvenile's parent, guardian or legal custodian has objected to the terms of the agreement. [Wis. Stat. § 938.245\(4\)](#), (7). In addition, in delinquency, CHIPS, and UCHIPS cases, the district attorney or corporation counsel can override the decision to enter into a deferred prosecution agreement or informal disposition only within 20 days after receiving notification of the intake worker's decision. [Wis. Stat. §§ 48.245\(5m\)](#), [938.245\(6\)](#).

Arguably, due process requires not only notice of termination of the disposition or agreement, but also some type of judicial review of the intake worker's decision that the child, expectant mother, or parent has not complied with the terms of the disposition or agreement. Cases dealing with the due-process rights of defendants who have entered into deferred prosecution agreements subsequently terminated by the state for noncompliance offer useful guidance.

**Note.** Melli and Hirsch draw an analogy between termination of informal dispositions and parole and probation revocation hearings. From that perspective, due process requires granting a child a hearing to determine whether noncompliance with the terms of an informal disposition or deferred prosecution agreement occurred and, if so, whether the terms themselves were unreasonable. *See* Melli & Hirsch, *supra* § 6.3, § 5.10. *But see* [United States v. Hicks](#), 693 F.2d 32 (5th Cir. 1982) (discussing differences between termination of pretrial diversion agreements and probation and parole revocation proceedings).

Although Wisconsin courts have not decided this due-process issue, at least one other state court has. The Washington Supreme Court has held that the due-process rights afforded defendants in parole and probation revocation proceedings apply equally to deferred prosecution agreements. Those rights include the right to have the agreement administered equitably “with full protection of the constitutional rights relinquished in the bargain.” [State v. Marino](#), 674 P.2d 171, 174–75 (Wash. 1984). (Unlike [Wis. Stat. § 48.245](#) or [Wis. Stat. § 938.245](#), Washington's deferred prosecution statute requires a court order to rescind the agreement. The *Marino* court acknowledged, however, that, regardless of the specific statutory language, the theory of deferred prosecution “entails more than the charging function and does not fall solely within prosecutorial discretion.” *Id.* at 173.) Therefore, due process requires granting a defendant a hearing for a judicial determination about whether the defendant failed to comply with the agreement. *Id.* at 175.

Like the Washington state court, federal courts that have addressed whether due process requires a termination hearing have held that it does. In [United States v. Hicks](#), 693 F.2d 32 (5th Cir. 1982), the government argued that the federal district court did not have the power to review termination decisions because doing so would amount to participating in the charging decision. The Fifth Circuit disagreed, holding

that the diversion agreement qualified as a contract, thus entitling the court to review alleged violations to determine whether the government had lived up to its end of the agreement. *Id.* at 33.

A second federal court, using different reasoning, reached a similar conclusion. In *United States v. Allen*, 683 F. Supp. 1136 (E.D. Mich. 1988), the district court held that a defendant who fulfills the terms of a pretrial diversion agreement earns the right not to be prosecuted and that this right “may be in the nature of a due process right.” *Id.* at 1138. The court suggested that, at a postindictment hearing, once a defendant proves the existence of a diversion agreement, the government has the burden of proving that prosecuting the defendant does not violate the agreement—that is, proving that the defendant has not complied with the agreement. *Id.*

VI. Standard Juvenile Court Forms [§ 6.38]

Following is a standard juvenile court form that might be useful in cases involving the material discussed in this chapter. The form can be downloaded from the website of the Wisconsin Juvenile Court Intake Association, at <https://wjcia.org/Court-Forms> (last visited Nov. 28, 2022). For a more complete list of standard juvenile court, see [appendix B](#), *infra*.

Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form      | Purpose   |
|-------------------------|---------------------------|-------------------|---|
| <a href="#">JD-1708</a> | Both                      | Notice to victims | Notice to the victims of their rights and options as required by state statutes |

Supplement Chapter 7

---

Filing of a Petition  
(CHIPS, JIPS, and Delinquency Cases)

---

Book sections supplemented: [7.1](#), [7.13](#), [7.18](#), [7.19](#), [7.22](#), [7.25](#), and [7.32](#)

7.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024).

7.13 [Procedure] [Time Periods] [When Intake Worker Requests That Petition Be Filed] Twenty-Day Time Period

[Page 7: Added Practice Tip to end of section](#)

**Practice Tip.** In some jurisdictions, courts routinely grant extensions of time to file a UCHIPS or CHIPS petition under [Wis. Stat.](#) § 48.21(1)(b)1.; however, attorneys should attempt to contest the need for additional time in every case because the statute implies that granting an extension should be the exception rather than the rule.



## 7.18 [Sufficiency of Petition] Formal Requirements

[Page 10: Replaced citation after quotation from Wis. Stat. § 822.29](#)

[Wis. Stat.](#) § 822.29(1); *see also* Book ch. 19 (Uniform Child Custody Jurisdiction and Enforcement Act).

## 7.19 [Sufficiency of Petition] Probable Cause

[Page 12: Added paragraph to end of section](#)

2023 Wis. Act 79 expanded the newborn safe-haven law to provide for the anonymous surrender of a newborn infant through the use of a newborn infant safety device, also called a “baby box.” *See* [Wis. Stat.](#) § 48.195. A parent who surrenders a newborn infant pursuant to this law has the right to remain anonymous, but the relinquishment itself can form the basis of probable cause for a CHIPS petition. *See* [Wis. Stat.](#) §§ 48.13(2m), 48.255(1)(e).

## 7.22 [Sufficiency of Petition] [Challenges to Sufficiency] Lack of Probable Cause

[Page 12: Added paragraph to end of section](#)

Like delinquency petitions, CHIPS petitions are also subject to the requirement of probable cause. [Wis. Stat.](#) § 48.255(1)(e) provides that the petition must include

reliable and credible information which forms the basis of the allegations necessary to invoke the jurisdiction of the court and to provide reasonable notice of the conduct or circumstances to be considered by the court together with a statement that the child is in need of supervision, services, care or rehabilitation.

*See also* *State v. Courtney E. (In the Int. of Courtney E.)*, [184 Wis. 2d 592](#), [516 N.W.2d 422](#) (1994).

## 7.25 [Sufficiency of Petition] Amendment of Petition

[Page 15: Added paragraph to end of section](#)

In *State v. Tawanna H. (In the Interest of Tawanna H.)*, [223 Wis. 2d 572](#), [590 N.W.2d 276](#) (Ct. App. 1998), the Wisconsin Court of Appeals indicated that a juvenile court judge sitting as fact-finder in a delinquency proceeding could not sua sponte amend a delinquency petition to conform to the proof without notice to the juvenile. In this case, the circuit court found the state had not proved a count of battery beyond a reasonable doubt, but then, without notice to the juvenile, the court attempted to amend the charge in the petition to disorderly conduct. The court of appeals determined that an amendment under these circumstances prejudiced the juvenile and was thus impermissible.

## 7.32 Standard Juvenile Court Forms

[Page 27: Amended Name of Form for Form JD-1757 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form                                   | Purpose  |
|-------------|---------------------------|--|--|
| JD-1757     | Both                      | Notice of right to seek postdisposition relief | Notice to inform juvenile after disposition of the right to seek postdisposition relief, and to document that the juvenile’s lawyer has counseled the defendant about seeking postdisposition relief |

# Chapter 7

# Filing of a Petition (CHIPS, UCHIPS, JIPS, and Delinquency Cases)

## I. [Scope of Chapter](#)

### [§ 7.1]

This chapter discusses the procedure for filing juvenile court petitions, the information they must contain, and the grounds for challenging their defects. A juvenile court proceeding commences with the filing of a petition. *D.W.B. v. State (In the Int. of D.W.B.)*, 158 Wis. 2d 398, 399, 462 N.W.2d 520 (1990). The requirements for filing petitions in cases involving children in need of protection or services (CHIPS), unborn children in need of protection or services (UCHIPS), juveniles in need of protection or services (JIPS), or delinquency appear in [Wis. Stat.](#) §§ 48.25, 48.255, 48.263, 938.25, 938.255, and 938.263. Like criminal complaints, juvenile court petitions must be legally sufficient and provide adequate notice to the parties of the allegations against them.<sup>1</sup>

**Note.** Although juvenile waiver hearings are initiated by the filing of a delinquency petition, waiver petitions are discussed in [chapter 14, \*infra\*](#). In addition, petitions seeking termination of parental rights are discussed in [chapter 17, \*infra\*](#).

## II. Procedure [§ 7.2]

### A. In General [§ 7.3]

As discussed in [chapter 6, \*supra\*](#), an intake worker reviews most cases in which it is believed that a child is delinquent or in need of protection or services or in which it is believed that an unborn child is in need of protection or services, except when a citation has been issued under [Wis. Stat.](#) § 938.17(2) (governing juvenile court jurisdiction over civil law and ordinance violations). The intake worker determines whether to close a case, handle it informally, handle it through deferred prosecution, or (under [Wis. Stat.](#) § 48.09 or 938.09) refer it to the district attorney, corporation counsel, or other official for the filing of a petition, thus commencing formal proceedings. (The district attorney represents the state in delinquency proceedings, and either the district attorney or corporation counsel represents the county in CHIPS, UCHIPS, and JIPS proceedings. [Wis. Stat.](#) §§ 48.09, 938.09.) In cases under [Wis. Stat.](#) ch. 48, the intake worker must file the request within 60 days after receiving the referral information. [Wis. Stat.](#) § 48.24(5). In cases under [Wis. Stat.](#) ch. 938, the intake worker must file the request within 40 days after receiving the referral information. [Wis. Stat.](#) § 938.24(5).

In CHIPS, UCHIPS, JIPS, and delinquency cases, if the intake worker requests that a petition be filed, the corporation counsel or district attorney can file a petition, close the case, or refer the case back to intake for further investigation. Action on the intake worker's request must be taken within 20 days after its receipt. [Wis. Stat.](#) §§ 48.25(2), 938.25(2)(a).

**Note.** The Wisconsin Supreme Court has held that a district attorney's request for more information from the law enforcement agency that investigated the case does not constitute a referral back to intake. *C.A.K. v. State (In the Int. of C.A.K.)*, 154 Wis. 2d 612, 619, 453 N.W.2d 897 (1990). The holding in *C.A.K.* was based on [Wis. Stat.](#) § 48.25(2) as it existed before the creation of the Juvenile Justice Code. [Wis. Stat.](#) § 938.25(2)(a) specifically permits a referral back to intake or the law enforcement agency investigating the case.

A number of questions have arisen concerning what constitutes receipt of the intake worker's request—in other words, what must happen to commence the 20-day period. The court of appeals has held that if a prosecutor files a second petition containing additional charges within 20 days after a second referral from intake, but more than 20 days after the first referral from intake, the court will dismiss the petition as untimely if the prosecutor possessed all the information alleged in the second petition when the prosecutor filed the first petition. *Shawn B.N. v. State (In the Int. of Shawn B.N.)*, 173 Wis. 2d 343, 353–57, 497 N.W.2d 141 (Ct. App. 1992). Although different sanctions for filing a late petition are available under [Wis. Stat.](#) ch. 938 than under [Wis. Stat.](#) ch. 48, the general principle remains the same: a prosecutor must demonstrate that further investigation was in fact necessary. See section [7.11, \*infra\*](#), for a description of the consequences of failure to act within applicable time periods.

At least one Wisconsin appellate court has found that the time for filing a petition began running after a second referral from intake. In an unpublished decision, the court of appeals held that a phone call by the district attorney seeking further information from the intake worker qualified as a “referral back to intake.” Consequently, the district attorney's time for filing a petition did not begin to run until the intake worker returned the case to the district attorney with the additional information. *R.A.B. v. State (In the Int. of R.A.B.)*, No. 90-0874, 1990 WL 130884 (Wis. Ct. App. July 24, 1990) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).



Defense counsel should keep in mind, however, that the prosecutor must demonstrate an actual need for further investigation. The court of appeals cautioned in *R.A.B.* that, because of the importance of documenting compliance with the statutory time periods, informal procedures such as a phone call are not “necessarily desirable.” In *R.A.B.*, the intake worker had noted in the file that the district attorney had referred the case back for further information.

In delinquency cases only, the district attorney can file a petition even if the intake worker requests closing or deferring the case. [Wis. Stat. § 938.24\(5\)](#).

In CHIPS and UCHIPS cases, the district attorney or corporation counsel can file a petition even if the intake worker enters into an informal disposition. The petition must be filed within 20 days after receiving notice of the informal disposition. [Wis. Stat. § 48.245\(5m\)](#). If an informal disposition is terminated, and the prosecutor files a petition under [Wis. Stat. ch. 48](#),

[t]he petition may include information received before the effective date of the informal disposition, as well as information received during the period of the informal disposition, including information indicating that a party has not met the obligations imposed under the informal disposition, to provide a basis for conferring jurisdiction on the court.

[Wis. Stat. § 48.245\(7\)](#); *see also* 2007 Wis. Act 199, § 8 (removing language from [Wis. Stat. § 48.245\(5m\)](#) that had prohibited admissibility of statements made to intake worker during intake inquiry).

**Note.** [Wis. Stat. § 938.245\(6\)](#) still deems statements made during the intake inquiry inadmissible if the deferred prosecution agreement is cancelled and a delinquency petition is filed.

## B. Who Must Sign Petition [§ 7.4]

In general, a petition must be signed by a person who knows the facts alleged or has been informed of the facts alleged and believes them to be true. [Wis. Stat. §§ 48.25\(1\), 938.25\(1\)](#).

In addition, some of the statutory grounds for petitions alleging either a child or juvenile to be in need of protection or services require particular individuals to sign the petition. For instance, [Wis. Stat. § 48.13\(4\)](#) requires that the parent or guardian sign the petition requesting jurisdiction over a child for whom the parent or guardian is unable or needs assistance to provide care or to provide necessary special treatment or care. *But see* [Wis. Stat. § 48.13\(4m\)](#) (providing juvenile court with exclusive original jurisdiction over child alleged to be in need of protection or services if the child’s “guardian is unable or needs assistance to care for or provide necessary special treatment or care for the child, but is unwilling or unable to sign the petition requesting jurisdiction under this subsection”). [Wis. Stat. § 938.13\(7\)](#) requires that the juvenile or a parent, guardian, or relative in whose home the juvenile resides sign the petition requesting jurisdiction over a juvenile who is habitually truant from home. *See* [Wis. Stat. §§ 938.02\(6\)](#) (“‘Habitual truant’ has the meaning given in [[Wis. Stat. § 118.16\(1\)\(a\)](#)].”), [118.16\(1\)\(a\)](#) (“‘Habitual truant’ means a pupil who is absent from school without an acceptable excuse under [[Wis. Stat. § 118.16\(4\)](#)] and [[Wis. Stat. § 118.15](#)] for part or all of 5 or more days on which school is held during a school semester.”). But a petition alleging that a juvenile is habitually truant from school does not require a juvenile, parent, or relative’s signature; instead, it requires evidence provided by the school attendance officer. [Wis. Stat. § 938.13\(6\)](#); *see also* [Wis. Stat. § 118.16\(5\), \(5m\)](#). [Wis. Stat. § 48.13\(9\)](#) requires that the child (who must be at least 12 years of age) sign the petition requesting that the court take jurisdiction because the child’s parents are unwilling, neglecting, unable, or need assistance to provide needed special care and treatment. [Wis. Stat. § 938.13\(4\)](#) requires the parent or guardian to sign the petition requesting jurisdiction over an uncontrollable juvenile.

The juvenile court does not have jurisdiction if the petition is not signed by the individual specifically required by the particular provision of [Wis. Stat. § 48.13](#) or [Wis. Stat. § 938.13](#). For example, in an unpublished decision, the court of appeals reversed a dispositional order based on the stipulation of all parties to an amended petition brought under [Wis. Stat. § 48.13\(4\)](#) because the petition was not signed by the parent. *P.B.R. v. Dane Cnty. Dep’t of Soc. Servs. (In the Int. of L.A.B.)*, No. 83-1230, 1984 WL 180447 (Wis. Ct. App. Feb. 24, 1984) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

The district attorney must sign delinquency petitions. [Wis. Stat. § 938.25\(1\)](#).

## C. Who Is Authorized to File Petition [§ 7.5]

### 1. Delinquency Petitions [§ 7.6]

Only the district attorney has the authority to prepare, sign, and file a delinquency petition under [Wis. Stat. § 938.12](#). [Wis. Stat. § 938.25\(1\)](#). Although in most delinquency cases the district attorney will have sufficient knowledge and belief to sign the petition, two commentators have noted that some circumstances might require two signatures—that of the person who has knowledge of the facts and that of the district attorney. Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 6.4 (2d ed. 1983). In deciding whether to file a petition, the district attorney should review the juvenile’s file to make sure that the facts support the intake worker’s request. *Id.* § 6.2.

## 2. CHIPS, UCHIPS, and JIPS Petitions [§ 7.7]

Petitions alleging that a child or juvenile is in need of protection or services under [Wis. Stat. § 48.13](#) or [Wis. Stat. § 938.13](#) can be filed by the district attorney or corporation counsel or by counsel or guardian ad litem for a parent, relative, guardian, or child. [Wis. Stat. §§ 48.25\(1\), 938.25\(1\)](#). Petitions alleging that an unborn child is in need of protection or services under [Wis. Stat. § 48.133](#) can be filed by the district attorney or corporation counsel, the counsel or guardian ad litem for the expectant mother, or the guardian ad litem for the unborn child. [Wis. Stat. § 48.25\(1\)](#). By allowing someone other than the district attorney or corporation counsel to file the petition, the statute provides individuals with direct access to the courts in CHIPS, UCHIPS, and JIPS cases. See Youth Pol’y & L. Ctr., *Children’s Code Revision Training Manual* 6-3 to 6-4 (1978).

**Comment.** In some instances, then, if the child, parent, relative, or guardian has filed a petition, an intake worker will not have investigated the case, and an official under [Wis. Stat. § 48.09](#) or [Wis. Stat. § 938.09](#) (that is, the district attorney or the corporation counsel) will not prosecute it. However, the juvenile court has authority to refer the case back to intake. [Wis. Stat. §§ 48.24\(1\), 938.24\(1\)](#); see also [Wis. Stat. §§ 48.21\(7\)](#) (allowing judge or circuit court commissioner to dismiss petition at detention hearing and refer case to intake for informal disposition), [938.21\(7\)](#) (allowing court to dismiss petition at detention hearing and refer case to intake for deferred prosecution). In addition, the juvenile court judge can act as the intake worker. [Wis. Stat. §§ 48.10, 938.10](#). When the judge acts as intake worker, the judge cannot participate further in the proceedings.

## 3. Delegation of Power by Parent [§ 7.8]

[Wis. Stat. § 48.979](#) allows a parent with legal custody of a child to petition for a power of attorney delegating powers of care and custody to an agent, generally for up to one year. See also [Wis. Stat. § 48.979\(1\)\(am\)](#) (providing for longer period if delegation is to a child’s relative or if delegation is approved by court). This does not include the power to terminate parental rights, consent to the marriage or adoption of the child, perform or induce an abortion on or for the child, or enlist the child in the armed forces. [Wis. Stat. § 48.979\(1\)\(a\)](#). It also cannot be used for children subject to CHIPS, JIPS, or delinquency orders, unless the court approves the delegation. [Wis. Stat. § 48.979\(1\)\(bm\)](#). See [Wis. Stat. § 48.979](#) for a complete explanation and limitations.

## D. Challenging the Decision Not to File Petition [§ 7.9]

In CHIPS, UCHIPS, JIPS, and delinquency cases, if the prosecutor refuses to file a petition, *any person* can file a motion asking that the juvenile court order the filing of a petition. [Wis. Stat. §§ 48.25\(3\), 938.25\(3\)](#). The court must hold a hearing on the request. [Wis. Stat. §§ 48.25\(3\), 938.25\(3\)](#). A judge can also move sua sponte to order that a petition be filed. [Wis. Stat. §§ 48.25\(3\), 938.25\(3\)](#). However, the judge who orders the filing of a petition must recuse himself or herself from hearing the case. See *supra* [ch. 3](#) (role of juvenile court judge).

**Comment.** Under [Wis. Stat. § 968.02\(3\)](#), if the district attorney refuses to issue a criminal complaint, a circuit court judge can permit the filing of a complaint if, after conducting a hearing, the judge finds probable cause that the person to be charged has committed an offense. The supreme court affirmed the constitutionality of this provision, holding that it did not violate the separation-of-powers doctrine. [State v. Unnamed Defendant](#), 150 Wis. 2d 352, 367, 441 N.W.2d 696 (1989), *overruling* [State ex rel. Unnamed Petitioners v. Connors](#), 136 Wis. 2d 118, 401 N.W.2d 782 (1987). The decision rested in part on the fact that the power of the judiciary has traditionally included the initiation of prosecutions. *Id.* at 366.

## E. Time Periods [§ 7.10]

### 1. In General [§ 7.11]

Under both [Wis. Stat. ch. 48](#) and [Wis. Stat. ch. 938](#), “[f]ailure ... to act within any time period ... does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction.” [Wis. Stat. §§ 48.315\(3\), 938.315\(3\)](#). Furthermore, failure to

object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). If the court or a party fails to act within an applicable statutory time period, the court may order any of the following: dismissal without prejudice, release of the child from secure or nonsecure custody or from the terms of a custody order, and any other relief that the court considers appropriate. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In addition, in [Wis. Stat.](#) ch. 938 cases, courts may dismiss a petition with prejudice. [Wis. Stat.](#) § 938.315(3). This remedy is not available under [Wis. Stat.](#) ch. 48. *See* [Wis. Stat.](#) § 48.315(3); *see also* 2007 Wis. Act 199.

**Note.** In *State v. Sanders*, 2018 WI 51, ¶ 55, [381 Wis. 2d 522](#), 912 N.W.2d 16, the Wisconsin Supreme Court reaffirmed that, in delinquency cases, the defendant's age at the time the defendant is charged, not the defendant's age at the time of committing the underlying conduct, determines the circuit court's ability to hear the case as a criminal, juvenile delinquency, or JIPS matter. This allowed a defendant to be charged as an adult, when he was 19 years old, for conduct that allegedly occurred when he was 8 or 9 years old.

## 2. When Intake Worker Requests That Petition Be Filed [§ 7.12]

### a. [Twenty-Day Time Period](#)

#### [§ 7.13]

After the date that the intake worker files a request, the district attorney or corporation counsel has 20 days to close the case, refer the case back to intake (or, in a [Wis. Stat.](#) ch. 938 case, to law enforcement, with notice to intake) for further investigation, or file a petition. [Wis. Stat.](#) §§ 48.25(2), 938.25(2)(a).

**Comment.** When a delinquency case is transferred from one county to another, statutory deadlines for the intake worker and district attorney begin anew. *State v. Everett*, 231 Wis. 2d 616, 605 N.W.2d 633 (Ct. App. 1999); *see also J.L.W. v. Waukesha Cnty. (In re J.L.W.)*, 143 Wis. 2d 126, 420 N.W.2d 398 (Ct. App. 1988).

**Note.** In cases in which the intake worker and the prosecutor received referral information from the intake worker of another county at the same time, the court of appeals has held (in two unpublished decisions) that the prosecutor's time for filing a petition does not begin to run until the second intake worker files a recommendation. *W.J.E. v. State (In the Int. of W.J.E.)*, No. 89-2284, 1990 WL 198056 (Wis. Ct. App. Oct. 4, 1990) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *B.L.M. v. State (In the Int. of B.L.M.)*, No. 88-0563, 1988 WL 112461 (Wis. Ct. App. Aug. 18, 1988) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *see supra* [ch. 6](#) (intake inquiry, referral by another county).

The drafting records of the Wisconsin Legislative Reference Bureau indicate that the legislature adopted the 20-day limit because the intake process tended to get "bogged down" once a case referral reached the prosecutor's office. *C.A.K. v. State*, 154 Wis. 2d 612, 622, 453 N.W.2d 897 (1990). The legislature adopted the 20-day limit to ensure the prompt disposition of juvenile cases. *Id.* at 623.

An exception to the 20-day rule arises when a child or expectant mother has been picked up and is then held in custody and not released. *See* [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a), 938.21(1)(a); *see also supra* [ch. 5](#) (physical custody). In this situation, under [Wis. Stat.](#) ch. 48, the petition must be filed by the time of the detention hearing, which must occur within 48 hours from the time the decision to hold the child or expectant mother was made. [Wis. Stat.](#) §§ 48.21(1)(a), 48.213(1)(a). The 48-hour period excludes Saturdays, Sundays, and legal holidays. Under [Wis. Stat.](#) ch. 938, the petition or a request for a change of placement or for the revision or extension of a dispositional order must also be filed by the time of the detention hearing, which must occur within 24 hours after the end of the day that the decision was made to hold the juvenile. [Wis. Stat.](#) § 938.21(1)(a). The 24-hour period excludes Saturday, Sundays, and legal holidays. A petition or request need not be filed by the time of the detention hearing if the child or expectant mother has been taken into custody pursuant to a *capias*, [Wis. Stat.](#) §§ 48.21(1)(a), 48.19(1)(b), 48.193(1)(b), 48.213(1)(a), 938.21(1)(a), 938.19(1)(b), or if the child was taken into custody as a runaway from another state, [Wis. Stat.](#) §§ 48.21(1)(a), 938.21(1)(a). Nor must a petition or request be filed if the child was taken into custody by a law enforcement officer who believed, on reasonable grounds, that (1) a *capias* had been issued for the child in another state; or (2) the child violated a condition of the child's supervision, placement in a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth, or participation in the intensive supervision program under [Wis. Stat.](#) § 938.534, or the conditions of a custody order. [Wis. Stat.](#) §§ 48.19(1)(d)2., 7., 48.193(1)(d)1., 3., 48.21(1)(a), 48.213(1)(a), 938.19(1)(d)2., 6., 7., 938.21(1)(a).

Failure to file a petition in a CHIPS or UCHIPS case, or a petition or request in a JIPS or delinquency case, by the time of a detention hearing for a child or expectant mother held in custody does not affect the court's competency to proceed. Instead, the child or expectant mother has a right to release from custody, unless the court grants one additional 48-hour extension in [Wis. Stat.](#) ch. 938 cases, or one additional 72-hour extension in [Wis. Stat.](#) ch. 48 cases. [Wis. Stat.](#) §§ 48.21(1)(a), (b), (bm), 48.213(1)(a), (b), 938.21(1)(a), (b). Under [Wis.](#)

[Stat.](#) §§ 48.21(1)(b), 48.213(1)(b), and 938.21(1)(b), the court can grant an extension only if the court finds probable cause that: (1) the child presents an imminent danger to himself or herself or to others; (2) the parent, guardian, or legal custodian of the child or other responsible adult is neglecting, refusing, unwilling, or unavailable to provide adequate supervision and care; or (3) there is a substantial risk that the physical health of the unborn child will be seriously affected or endangered by the expectant mother's habitual lack of self-control in the use of alcohol or drugs, exhibited to a severe degree, and that the expectant mother is refusing or has refused to accept any alcohol or drug abuse services or is not making a good-faith effort to participate in any alcohol or drug abuse services offered to her. Additionally, in UCHIPS and CHIPS cases, the court can grant an extension if probable cause exists to believe that additional time is required to determine whether the filing of a petition initiating proceedings under [Wis. Stat.](#) ch. 48 is necessary. [Wis. Stat.](#) § 48.21(1)(b)1.

## **b. Extension Granted by Court [§ 7.14]**

If a CHIPS or UCHIPS petition is filed after the 20-day period expires, the court may dismiss the petition without prejudice. [Wis. Stat.](#) §§ 48.25(2), 48.315(3). If a delinquency or JIPS petition is not filed within the 20-day period, the court may dismiss the petition with or without prejudice. [Wis. Stat.](#) §§ 938.25(2)(a), 938.315(3). Other remedies available under both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 include releasing the child from custody, granting a continuance, or granting any other relief the court finds appropriate. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 proceedings, failure to act within a statutory time period waives any challenge to the court's competency to act on the petition. [Wis. Stat.](#) §§ 48.25(2), 938.25(2)(a).

When the prosecutor seeks a court order extending the time for filing a petition, the court must make any finding of good cause on the record before the time period expires. See [Wis. Stat.](#) §§ 48.315(2), 938.315(2); *M.G. v. La Crosse Cty. Hum. Servs. Dep't (In the Int. of G.H.)*, 150 Wis. 2d 407, 418, 441 N.W.2d 227 (1989); *J.R. v. State (In re J.R.)*, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989); *T.H. v. La Crosse Cnty. (In the Int. of R.H.)*, 147 Wis. 2d 22, 39, 433 N.W.2d 16 (Ct. App. 1988).

While these cases were based on [Wis. Stat.](#) § 48.25 as it existed before the creation of the Juvenile Justice Code, the requirement of a good-cause determination before expiration of the time period arguably still applies under the current statutes.

Although not exhaustive, [Wis. Stat.](#) §§ 48.315(1) and 938.315(1) list those periods excluded in computing applicable statutory time periods. The periods relevant to the late filing of petitions include the following:

1. Any period of delay resulting from other actions concerning the child or the unborn child and the unborn child's expectant mother, [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.;
2. Any period of delay resulting from a continuance granted at the request of or with the consent of the child and the child's counsel or of the unborn child's guardian ad litem, [Wis. Stat.](#) §§ 48.315(1)(b), 938.315(1)(a)2.;
3. Any period of delay resulting from a continuance granted to the prosecutor based on the unavailability of evidence material to the case, after a showing that the prosecutor has exercised due diligence and that reasonable grounds exist to believe that the evidence will be available later, [Wis. Stat.](#) §§ 48.315(1)(d), 938.315(1)(a)4.;

**Note.** This exclusion would apply when the prosecutor needs additional information from someone other than the intake worker, as in *C.A.K. v. State (In the Interest of C.A.K.)*, 154 Wis. 2d 612, 619, 453 N.W.2d 897 (1990) (discussed in section 7.3, *supra*). If the prosecutor needs additional information before filing the petition, the prosecutor can also refer the case back to intake (or law enforcement in [Wis. Stat.](#) ch. 938 cases) for further investigation. The intake worker or law enforcement agency has 20 days within which to complete the investigation. In this instance, the 20-day time period does not begin to run until the intake worker or law enforcement agency returns the case to the prosecutor. See [Wis. Stat.](#) §§ 48.25(2), 938.25(2)(a).

4. Any period of delay resulting from a continuance granted to the prosecutor to enable him or her additional time to prepare, but only if exceptional circumstances justify an extension, [Wis. Stat.](#) §§ 48.315(1)(d), 938.315(1)(a)4.; and
5. A reasonable period of delay not to exceed 20 days, granted at the request of the parent, Indian custodian, or tribe of a child whom the court knows or has reason to know is an Indian child, to enable the requester to prepare for a proceeding under [Wis. Stat.](#) ch. 48 or a JIPS proceeding under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), in a case involving the out-of-home placement of or termination of parental rights to the child, [Wis. Stat.](#) §§ 48.315(1)(j), 938.315(1)(a)11.

Noting that the best interests of the child include holding the child responsible for the child's actions, the court of appeals has held that factors relevant to good cause include good faith on the part of the prosecutor, absence of prejudice to the opposing party, and whether the



dilatory party took prompt action to remedy the situation. *F.E.W. v. State (In the Int. of F.E.W.)*, 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988).

**Comment.** Although these factors are also relevant to the doctrine of excusable neglect, the court stressed that “the law of excusable neglect does not and should not govern ‘good cause’ determinations pursuant to [Wis. Stat. § 48.25(2)(a)].” *Id.* at 861 n.1. (Wis. Stat. § 48.25(2)(a) was the predecessor to Wis. Stat. § 938.25(2)(a).) But neglect seems the operative—and appropriate—doctrine when the late filing results from the prosecution’s failure to follow up on a request for additional information from its own law enforcement agency. Indeed, a review of the appellate briefs filed in *F.E.W.* reveals a concession by the state that the temporary loss of the police reports occurred because of negligence. *F.E.W.*, 143 Wis. 2d 856, Resp’t’s Br. at 2. In addition, one unpublished court of appeals decision has held that the presence of prosecutorial good faith does not excuse noncompliance with the mandatory time limits of Wis. Stat. § 48.24(5). *B.L.M. v. State (In the Int. of B.L.M.)*, No. 88-0563, 1988 WL 112461 (Wis. Ct. App. Aug. 18, 1988) (unpublished opinion not citable per Wis. Stat. § 809.23(3)). This result makes sense, given the statute’s legislative history, which demonstrates that the 20-day requirement serves to ensure that juvenile cases do not languish in the prosecutor’s office or get lost in the shuffle.

### c. Statement of Reasons Attached to Late Petition [§ 7.15]

If the prosecutor does not file a petition within the 20-day time period and the court has not granted an extension, the petition must include a statement of reasons for the delay. Wis. Stat. §§ 48.25(2), 938.25(2)(a). The late petition must contain this statement, and the prosecutor cannot amend the petition after the plea hearing to state the reasons for the delay. *C.A.K. v. State*, 154 Wis. 2d 612, 623, 453 N.W.2d 897 (1990). Under both Wis. Stat. ch. 48 and Wis. Stat. ch. 938, the juvenile court may, while ensuring the safety of the child, dismiss the petition without prejudice, release the child from custody or from the terms of a custody order, or grant any other relief that the court considers appropriate. Wis. Stat. §§ 48.315(3), 938.315(3). Wis. Stat. ch. 938 also permits dismissal of the case with prejudice. Wis. Stat. § 938.315(3).

## 3. When Intake Worker Closes Case or Enters into Deferred Prosecution Agreement Under Wis. Stat. Ch. 938 [§ 7.16]

In delinquency cases, if the intake worker closes the case or enters into a deferred prosecution agreement, the district attorney has 20 days after receipt of the notice of closure or deferred prosecution to file a petition. Wis. Stat. § 938.25(2)(b); *see also* Wis. Stat. § 938.24(5). If the district attorney does file a petition, the district attorney must notify the parties to the deferred prosecution agreement and the intake worker as soon as possible. Wis. Stat. § 938.25(2)(b).

Failure to file a petition within 20 days invalidates a petition filed after that period and affirms the case closure or deferred prosecution agreement.

**Comment.** While the prosecutor has the authority to terminate a deferred prosecution agreement entered into by an intake worker, no such authority exists for court-ordered deferred prosecution agreements. In *State v. Lindsey A.F. (In re Lindsey A.F.)*, 2003 WI 63, 262 Wis. 2d 200, 663 N.W.2d 757, the Wisconsin Supreme Court upheld the court of appeals’ decision denying the state’s claim that a district attorney had the authority to terminate a court-ordered deferred prosecution agreement by filing a second delinquency petition containing the same charge and facts. The authority of a district attorney to terminate a deferred prosecution agreement under Wis. Stat. § 938.245(6) is contingent on receiving notice from an intake worker under Wis. Stat. § 938.24(5). When the court orders deferred prosecution, no such notice occurs.

In *State v. C.G.B. (In the Interest of C.G.B.)*, 2017 WI App 32, 375 Wis. 2d 781, 896 N.W.2d 387, the court of appeals held that, although a court can exercise its discretion to dismiss a delinquency petition and refer the matter for a deferred prosecution agreement over a district attorney’s objection, a consent decree under Wis. Stat. § 938.32 requires the district attorney’s agreement.

## III. Sufficiency of Petition [§ 7.17]

### A. Formal Requirements

#### [§ 7.18]

A CHIPS or nondelinquency JIPS petition must carry the caption “In the interest of (child’s name), a person under the age of 18,” Wis. Stat. §§ 48.255(1), 938.255(1), while a delinquency petition or a JIPS petition under Wis. Stat. § 938.13(12) must be titled “In the interest of (juvenile’s name), a person under the age of 17,” Wis. Stat. § 938.255(1). All petitions must set forth with specificity (1) the name, birth

date, and address of the child, and whether the child has been adopted, [Wis. Stat.](#) §§ 48.255(1)(a), 938.255(1)(a); (2) the names and addresses of the child's parent, guardian, legal custodian, or spouse (or nearest relative, if necessary), [Wis. Stat.](#) §§ 48.255(1)(b), 938.255(1)(b); and (3) whether the child is in custody and, if so, where and when taken into custody, [Wis. Stat.](#) §§ 48.255(1)(c), 938.255(1)(c). But if there is "reasonable cause to believe that such disclosure would result in imminent danger to the child or physical custodian," the petition need not include this information. [Wis. Stat.](#) § 48.255(1)(c); *see also* [Wis. Stat.](#) § 938.255(1)(c) (same for juvenile).

The petition must also contain the information required by [Wis. Stat.](#) § 822.29(1). *See* [Wis. Stat.](#) §§ 48.255(1)(cg), 938.255(1)(cg). This information includes the following:

(1) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit shall state whether the party:

(a) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or physical placement or visitation with the child and, if so, shall identify the court, the case number, and the date of the child custody determination, if any.

(b) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, shall identify the court, the case number, and the nature of the proceeding.

(c) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

[Wis. Stat.](#) § 822.29(1).

A UCHIPS petition must carry the caption "In the interest of (J. Doe), an unborn child, and (expectant mother's name), the unborn child's expectant mother." [Wis. Stat.](#) § 48.255(1m). The petition must also set forth with specificity: (1) the estimated gestational age of the unborn child, [Wis. Stat.](#) § 48.255(1m)(a); (2) the name, birth date, and address of the expectant mother, [Wis. Stat.](#) § 48.255(1m)(b); and (3) the names and addresses of the parent, guardian, legal custodian, or spouse of a child expectant mother, or the name and address of the spouse of an adult expectant mother, [Wis. Stat.](#) § 48.255(1m)(bm). If no such persons can be identified, the petition should state the name and address of the nearest relative of the expectant mother. *Id.* In addition, the petition should state whether the expectant mother is in custody and, if so, where and when she was taken into custody, unless there is reasonable cause to believe that disclosure of such information would result in imminent danger to the unborn child, expectant mother, or physical custodian. [Wis. Stat.](#) § 48.255(1m)(c).

In CHIPS cases and in JIPS cases initiated pursuant to [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), the petition must state whether the child may be subject to the federal Indian Child Welfare Act (ICWA), 25 [U.S.C.](#) §§ 1901–1963, and, if the child may be subject to that act, the names and addresses of the child's Indian custodian, if any, and Indian tribe, if known. [Wis. Stat.](#) §§ 48.255(1)(cm), 938.255(1)(cm). In UCHIPS cases, the petition must state whether the unborn child, when born, may be subject to ICWA and, "if the unborn child may be subject to that act, the name and address of the Indian tribe in which the unborn child may be eligible for affiliation when born, if known." [Wis. Stat.](#) § 48.255(1m)(d).

If the petition is initiating proceedings under [Wis. Stat.](#) § 938.12 (delinquency) or [Wis. Stat.](#) § 938.13(12) (JIPS delinquency) and all of the following circumstances apply, the petition must state that

1. The juvenile is an Indian juvenile.
2. At the time of the alleged delinquent act, the juvenile was under the order of a tribal court, other than a tribal court order relating to adoption, physical placement or visitation with the juvenile's parent, or permanent guardianship.
3. At the time of the delinquent act, the juvenile was physically outside the boundaries of the reservation of the Indian tribe of the tribal court and any off-reservation trust land of either that tribe or a member of that tribe as a direct consequence of the tribal court order, including a tribal court order placing the juvenile in the home of a relative who, on or after the date of the tribal court order, resided outside the boundaries of a reservation and off-reservation trust land.

[Wis. Stat.](#) § 938.255(1)(cr)1. If such a statement is included in the petition and if a tribal official has notified the intake worker or prosecutor that a petition relating to the delinquent act has been or may be filed in tribal court with respect to the alleged delinquent act, the petition must contain a statement to that effect. [Wis. Stat.](#) § 938.255(1)(cr)2.

In addition, in a proceeding under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), if the petitioner knows or has reason to know that the child or expectant mother is an Indian child, and if the child or expectant mother has been removed from the home of his or her parent or Indian custodian, the petition must also specify “reliable and credible information” showing that continued custody of the child or expectant mother by his or her parent or Indian custodian is “likely to result in serious emotional or physical damage” to the child or expectant mother and that “active efforts” have been made to prevent the breakup of the Indian child’s family and that those efforts have proved unsuccessful. [Wis. Stat.](#) §§ 48.255(1)(g), (1m)(g), 938.255(1)(g); *see also* [Wis. Stat.](#) §§ 48.028(4)(d), 938.028(4)(d). In such a proceeding, if the court determines or has reason to know that the child is an Indian child, the court must provide notice of the proceeding to the child’s parent, Indian custodian, and tribe in the manner specified in [Wis. Stat.](#) §§ 48.028(4)(a) and 938.028(4)(a). [Wis. Stat.](#) §§ 48.299(9), 938.299(10).

If the child or child expectant mother is being held in custody outside the home, a CHIPS, UCHIPS, or JIPS petition must also contain reliable and credible information showing that continued placement of the child or child expectant mother in his or her home would be contrary to his or her welfare and that the person who took the child or child expectant mother into custody and the intake worker made reasonable efforts to prevent the removal of the child or child expectant mother from the home, while ensuring that the child or child expectant mother’s health and safety are the paramount concerns, and to make it possible for the child or child expectant mother to return safely home. [Wis. Stat.](#) §§ 48.255(1)(f), (1m)(f), 938.255(1)(f). Information related to the reasonable efforts made to prevent removal of the child from the home and to return the child home need not be included if any of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. apply. These circumstances include the following: (1) the parent has subjected the child to “aggravated circumstances,” including abandonment, torture, chronic abuse, or sexual abuse; (2) the parent has committed certain specified crimes, such as attempted homicide, against a child of the parent; (3) the parent has committed certain specified crimes, such as sexual assault, resulting in great bodily harm or substantial bodily harm against the child or another child of the parent; (4) the parent has committed child trafficking against a victim who was the parent’s child; (5) the parental rights of the parent to another child have been involuntarily terminated; or (6) the parent relinquished custody of the child when the child was 72 hours old or younger. [Wis. Stat.](#) §§ 48.355(2d)(b)1.–5., 938.355(2d)(b)1.–4.

If the petitioner does not know or cannot ascertain any of these facts, the petition must include a statement to that effect. [Wis. Stat.](#) §§ 48.255(2), 938.255(2).

## B. Probable Cause

### [§ 7.19]

Delinquency petitions or JIPS petitions based on a violation of a criminal statute, ordinance, or other law, *see* [Wis. Stat.](#) §§ 938.12, 938.13(12), must cite the appropriate law or ordinance and provide facts sufficient to establish probable cause that an offense has been committed and that the juvenile named in the petition committed the offense. [Wis. Stat.](#) § 938.255(1)(d). If the petition alleges that a child, unborn child, or juvenile is in need of protection or services under [Wis. Stat.](#) § 48.13 or [Wis. Stat.](#) § 48.133 or the nondelinquency provisions of [Wis. Stat.](#) § 938.13, the petition must contain both (1) a statement that the child, expectant mother, or juvenile needs supervision, services, care, or rehabilitation; and (2) reliable and credible information supporting the grounds for jurisdiction and providing reasonable notice. [Wis. Stat.](#) §§ 48.255(1)(e), (1m)(e), 938.255(1)(e). In UCHIPS cases, the petition must also contain a statement that the unborn child is in need of protection or care. [Wis. Stat.](#) § 48.255(1m)(e).

Any petition that does not articulate facts sufficient to establish probable cause or does not provide reliable and credible information to support the allegations “shall be” dismissed or amended. [Wis. Stat.](#) §§ 48.255(3), 938.255(3); *see also* *infra* § 7.25 (amendment of petition).

A CHIPS or UCHIPS petition generally must rest on information received within the 60-day period preceding the time that the intake worker makes a request. [Wis. Stat.](#) § 48.24(5). CHIPS or UCHIPS petitions can contain information received more than 60 days before the intake worker’s request to establish a condition or pattern that, together with information received within the 60-day period, provides a basis for the court’s jurisdiction. *Id.*

## C. Challenges to Sufficiency [§ 7.20]

### 1. In General [§ 7.21]

Challenges to a petition based on lack of probable cause on the face of the petition or on the insufficiency of the petition must be raised no later than 10 days after the plea hearing or be deemed waived. [Wis. Stat.](#) §§ 48.297(2), 938.297(2). An admission or no-contest plea also waives the issue. *See* [Mack v. State](#), 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980).



A challenge to the sufficiency of a petition alleging delinquency can rest on a claim that the petition fails to demonstrate probable cause that a crime was committed and that the juvenile committed it. Challenges to CHIPS, UCHIPS, JIPS, and delinquency petitions can rest on due-process grounds, such as the petition's failure to provide notice of the allegations sufficient to enable the parties adequately to prepare for trial.

## 2. [Lack of Probable Cause](#)

### [§ 7.22]

[Wis. Stat.](#) § 938.255(1)(d) requires that a delinquency petition contain facts sufficient to establish probable cause that a crime was committed and that the juvenile named in the petition committed the offense. The court applies the same standard used to determine the sufficiency of a criminal complaint: whether the facts alleged in the petition, as well as reasonable inferences drawn from those facts, are sufficient to establish probable cause. [State ex rel. Evanow v. Seraphim](#), 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968).

## 3. [Lack of Notice](#) [§ 7.23]

The same principles governing the sufficiency of criminal complaints apply in determining the sufficiency of CHIPS, UCHIPS, JIPS, and delinquency petitions: the pleading must recite the essential facts constituting the basis for the action. [Sheboygan Cty. v. D.T. \(In the Int. of L.A.T.\)](#), 167 Wis. 2d 276, 283, 481 N.W.2d 493 (Ct. App. 1992). The U.S. Supreme Court has held that a child has a right to constitutionally adequate notice of the specific charges against the child. [In re Gault](#), 387 U.S. 1, 33 (1967).

The petition should recite the “five Ws” journalists use in writing lead paragraphs in news stories: what offense occurred, who committed it, when and where the offense took place, and why this particular person is being charged. [L.A.T.](#), 167 Wis. 2d at 283; [State ex rel. Evanow v. Seraphim](#), 40 Wis. 2d 223, 229–30, 161 N.W.2d 369 (1968). In [State ex rel. Evanow v. Seraphim](#), the supreme court added a “sixth W”: who is making the allegation. [Evanow](#), 40 Wis. 2d at 230.

The 14th Amendment requires that CHIPS, UCHIPS, JIPS, and delinquency petitions, like criminal complaints, be sufficiently specific to provide notice and the opportunity to defend against the allegations. A petition must contain the elements of the crime (in delinquency cases) or the jurisdictional grounds (in CHIPS, UCHIPS, and JIPS cases) and must permit the parent, child, or expectant mother to plead and prepare a defense.

**Comment.** An example of a factually insufficient CHIPS petition occurred in an unpublished court of appeals decision, [Rock Cnty. v. R.H. \(In the Int. of T.J.H.\)](#), No. 91-0609, 1991 WL 180026 (Wis. Ct. App. July 25, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). Applying the “five Ws” test, the court found the petition insufficient because it contained only conclusory allegations. Allegations that the father pointed an unloaded gun at his child and pulled the trigger, had a history of carrying weapons, possessed loaded weapons that the child handled on at least one occasion, and was a convicted felon did not suffice to show endangerment under [Wis. Stat.](#) § 48.13(10).

In [State v. Fawcett](#), 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), the court of appeals adopted a reasonableness test to judge whether the time frame alleged in a criminal complaint violates due process. The test focused not on the ability of the defendant to prepare a defense but on the ability of the state (and the victim) to specify a date. Although the Seventh Circuit upheld the decision on habeas review, the federal court of appeals described the test adopted by the state court as “a fuzzy approach.” [Fawcett v. Bablitch](#), 962 F.2d 617, 619 (7th Cir. 1992). The federal court instead used the standard articulated in [Hamling v. United States](#), 418 U.S. 87 (1974): “Did the charge enable an innocent accused to mount an adequate defense?” [Fawcett](#), 962 F.2d at 619. The Wisconsin Supreme Court further expanded its interpretation of the [Fawcett](#) factors, making it more difficult for defendants to prevail on this due-process notice argument—at least when offenses involve young victims, as they frequently do in delinquency cases. See [State v. Hurley](#), 2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 174; [State v. Kempainen](#), 2015 WI 32, 361 Wis. 2d 450, 862 N.W.2d 587. Defense counsel should be familiar with the [Hamling](#) test, as ratified by the federal court in [Fawcett](#). The Wisconsin Supreme Court adopted a [Hamling](#) -like test in [Holesome v. State](#), 40 Wis. 2d 95, 161 N.W.2d 283 (1968). In 2020, the Wisconsin Supreme Court distinguished [Fawcett](#), agreeing that “[i]f the state is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged,” but concluding that a second prosecution for sexual assault of a child under 16 was beyond the end date for the repeated sexual assaults of a child charged in the first prosecution, because [Fawcett](#) “expressly limited its ‘rigid double jeopardy analysis’ to later prosecutions ‘based upon the same transaction during the same time frame.’” [State v. Schultz](#), 2020 WI 24, ¶¶ 43–44, 390 Wis. 2d 570, 939 N.W.2d 519 (holding that defendant was not twice put in jeopardy for same offense because sexual assaults charged in each prosecution were separated in time), *cert. denied*, 141 S. Ct. 344 (2020).

## 4. [Material Misstatement](#) [§ 7.24]

In a delinquency case, if the juvenile claims that the petition contains an intentionally false statement necessary to finding probable cause, or if the petition omits a fact essential for the court to determine probable cause, the juvenile has a right under *Franks v. Delaware*, 438 U.S. 154 (1978), to an evidentiary hearing (a *Franks* hearing). *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). In *Mann*, the supreme court held that the circuit court need not determine whether the misstatements were intentional because a complaint can be reissued so long as it states probable cause. *Id.* at 387. The same rationale applies to delinquency petitions under *Wis. Stat.* § 938.255(3). To trigger a *Franks* hearing, the juvenile must first make a substantial preliminary showing that the juvenile's challenge rests on more than conclusory claims and that the false statement was deliberately made or made with reckless disregard for the truth. *Id.* at 388. Unlike misstatements, omissions must be "undisputed, capable of single meanings and critical to a probable cause determination." *Id.* If the petition does not support probable cause without the allegedly false statements, then the court must hold a hearing. *Id.* at 388–89.

At a *Franks* hearing, the juvenile must prove the omission or intentional falsity of the statement by a preponderance of the evidence. *Id.* at 389. The court must then determine the effect of the statement or omission on probable cause. *Id.* The court must dismiss a petition that does not state probable cause after removing from the petition the proved misrepresentations and after considering the effects of the proved omissions. After dismissal, the prosecutor can reissue a criminal complaint if it states probable cause. Juvenile petitions can be amended under *Wis. Stat.* § 938.255(3), consistent with the requirements of *Wis. Stat.* § 938.263(2).

## D. Amendment of Petition

### [§ 7.25]

Except when a petition fails to state probable cause or reliable and credible information providing a basis for allegations that the child or unborn child is in need of protection or services, a court cannot dismiss a petition for any error or mistake, as long as the case and the identity of the child or expectant mother can be readily ascertained. The court can order an amendment curing the defect. *Wis. Stat.* §§ 48.263(1), 938.263(1).

**Comment.** An unpublished court of appeals decision illustrates the type of error or mistake appropriate for amendment under *Wis. Stat.* § 48.263 or *Wis. Stat.* § 938.263. In *W.R.C. v. State (In the Interest of W.R.C.)*, No. 88-0554, 1988 WL 100467 (Wis. Ct. App. July 20, 1988) (unpublished opinion not citable per *Wis. Stat.* § 809.23(3)), the district attorney filed a petition alleging D.A.T. to be a delinquent child. The petition implicated another child, W.R.C. Because the state failed to file a petition charging W.R.C. within the mandatory 20-day time limit, the district attorney instead attempted to amend the caption of the D.A.T. petition to charge W.R.C. The circuit court upheld the amendment under *Wis. Stat.* § 48.263(1) (the predecessor to *Wis. Stat.* § 938.263(1)), holding that the D.A.T. petition provided W.R.C. with sufficient notice and that the court readily understood the identity of W.R.C. The court of appeals reversed, holding that the D.A.T. petition did not allege the delinquency of W.R.C. and could not readily be understood to identify W.R.C. as the subject individual. The court noted that ruling otherwise would entail substituting the subjective intent of a district attorney for the requirements of *Wis. Stat.* § 48.255. Although the *W.R.C.* case predated the creation of the Juvenile Justice Code, the court's rationale would presumably apply under *Wis. Stat.* § 938.255, which now governs the form and content of delinquency petitions.

The petition may be amended before taking a plea under *Wis. Stat.* § 48.30 or *Wis. Stat.* § 938.30, provided that interested parties receive reasonable notice. *Wis. Stat.* §§ 48.263(2), 938.263(2). *Wis. Stat.* §§ 48.30 and 938.30 govern the plea hearing, at which an admission or no-contest plea can be entered, or a denial entered and a trial date set. See *infra* [ch. 8](#) (plea hearings).

After taking a plea in the case of a juvenile alleged delinquent or in need protection or services, the court can allow amendment of the petition to conform to the proof only if the amendment does not prejudice the juvenile. *Wis. Stat.* § 938.263(2). Like the charging document in a criminal case, a delinquency petition serves to inform the juvenile of the acts that he or she allegedly committed so that the juvenile can prepare a defense. See *State v. Flakes*, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987). The amendment of a petition prejudices a juvenile if he or she does not have notice of the nature and cause of the accusations against him or her. *Id.* At the fact-finding stage, to show prejudice, the juvenile must demonstrate that the juvenile's defense would have differed if the juvenile had defended against the petition as amended rather than the petition as filed. *Id.* at 420. The mere addition of charges that increase the possibility of a more severe penalty at disposition does not constitute prejudice. *State v. Wickstrom*, 118 Wis. 2d 339, 348–49, 348 N.W.2d 183 (Ct. App. 1984).

In cases alleging a child or unborn child to be in need of protection or services under *Wis. Stat.* ch. 48, the petition can be amended after the court takes the plea, but only if the court allows any objecting party a continuance for a reasonable period. *Wis. Stat.* § 48.263(2). Because *Wis. Stat.* § 938.263(2) does not contain comparable language regarding continuances, a continuance does not therefore seem to be an appropriate remedy when the district attorney seeks to amend a delinquency or JIPS petition to conform to the proof and the juvenile has shown that the amendment will result in prejudice.

#### IV. Practice Forms [§ 7.26]

The forms in this section are offered as practice guides. Always check original sources of authority for current law. When using the sample forms, also check local practice and adapt the form language to fit the client's circumstances. Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System's website, at <http://www.wicourts.gov/forms1/circuit.htm>. A list of those standard court forms is included in section [7.32](#) and [appendix B](#), *infra*.

**A. Motion to Dismiss the Petition (Form CRM-0185) [§ 7.27]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_



## MOTION TO DISMISS THE PETITION<sup>[10]</sup>

1. (Juvenile's name), by (his) (her) attorney, moves the court to dismiss (the petition) (a given portion of the petition) filed against (him) (her) on (date).

2. The grounds for this motion are as follows.

a. (Juvenile's name) was taken into custody by (name of person taking into custody) on (date) for allegedly (describe allegations) in violation of (cite statute or ordinance allegedly violated).

b. The petition filed in this court based on that incident states in its pertinent part "(quote from petition)."

c. This portion of the petition (fails to state probable cause) (fails to state an act that would give the court jurisdiction) (relies on a statute that is on its face unconstitutionally vague and overbroad) in violation of U.S. Const. amend. I, V, VI, and XIV, and Wis. Const. art. I, § 7, because (state reasons).

Dated \_\_\_\_\_

(Firm/Office name)

Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]

(Attorney's name)

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

### B. Motion to Dismiss or, in the Alternative, to Remand the Proceeding to the Intake Stage (Form CRM-0186) [§ 7.28]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_





**MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
TO REMAND THE PROCEEDING TO THE INTAKE STAGE** <sup>[11]</sup>

---

1. *(Juvenile's name)*, by *(his) (her)* attorney, moves the court to dismiss the action against *(him) (her)* or, in the alternative, to order the intake staff of this *(court) (county)* to conduct an intake inquiry pursuant to [Wis. Stat. § 938.24\(1\)](#), and to make a formal report to this court of those facts and reasons that support the decision to refer this matter for formal court process.
2. The grounds for this motion are as follows.
  - a. On *(date)*, *(juvenile's name)* was taken into custody by *(name of person taking into custody)*, and later released, for allegedly *(describe allegation)*.
  - b. On information and belief, a report of this contact was transmitted by *(name of person or agency)* to the intake staff of this *(court) (county)*.
  - c. On information and belief, no intake inquiry was conducted in this matter to determine whether the available facts establish prima facie jurisdiction or to determine the best interests of *(juvenile's name)* and the public with regard to any action to be taken, as is required by [Wis. Stat. § 938.24\(1\)](#).
  - d. On *(date)*, a petition alleging *(juvenile's name)* to be a delinquent juvenile was filed in the court.
  - e. The failure to conduct an intake inquiry violates [Wis. Stat. § 938.24\(1\)](#) and invalidates the petition filed in this matter because there is no assurance that the cause has sufficient weight or that resolution of the matter is best accomplished by a formal proceeding.
  - f. Failure to involve *(juvenile's name)* and *(his) (her)* counsel in an intake inquiry prevented the pursuit of appropriate alternative treatments or adjustments of this matter.
  - g. The clear purpose of the Wisconsin Juvenile Justice Code, [Wis. Stat. ch. 938](#), is that matters involving juveniles be resolved without formal court process if possible.

Dated \_\_\_\_\_

*(Firm/Office name)*  
Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]  
\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*  
*(Attorney's email address)*  
*(Attorney's telephone number)*  
State Bar No. \_\_\_\_\_

**C. Motion to Dismiss the Petition for Failure to Comply with Statutory Time Periods (Form CRM-0187) [§ 7.29]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



**MOTION TO DISMISS THE PETITION  
FOR FAILURE TO COMPLY WITH  
STATUTORY TIME PERIODS <sup>[12]</sup>**

---

1. (Juvenile's name), by *(his) (her)* attorney, moves the court to dismiss the petition filed against *(him) (her)* on (date).
2. The grounds for this motion are as follows.
  - a. The petition failed to comply with the statutory time periods.
  - b. (Juvenile's name) was taken into custody by (name of person taking into custody) on (date) for allegedly (describe allegation) in violation of (cite statute or ordinance violated). (Juvenile's name) has been held in (secure) (nonsecure) custody since that date.
  - c. A petition alleging delinquency was filed on (date).

***[Add appropriate alternative(s)]***

- d. On (date), the intake worker requested the filing of a petition; this request was more than 40 days after the referral had been made to intake, and therefore violated [Wis. Stat. § 938.24\(5\)](#).
- e. The intake worker filed a request regarding this case on (date), which was more than 20 days before the petition was filed, and therefore the filing of the petition violated [Wis. Stat. § 938.25\(2\)](#).
- f. A plea hearing on that petition has not been held within (number) days, as required by [Wis. Stat. § 938.30\(1\)](#), and no continuance of the plea hearing has been ordered pursuant to [Wis. Stat. § 938.315](#).
- g. A plea hearing on the petition was held on (date), at which time (juvenile's name) *(contested) (did not contest)* the charges. A *(fact-finding) (dispositional)* hearing has not yet been held, even though (number) days have elapsed since the plea hearing, in violation of [Wis. Stat. § \(938.30\(7\)\) \(938.30\(6\)\)](#), and no continuance has been ordered pursuant to [Wis. Stat. § 938.315](#).
- h. A fact-finding hearing was held on (date), and (number) days have elapsed since that time, but no dispositional hearing has been held, which violated [Wis. Stat. § 938.31\(7\)](#), and no continuance has been ordered pursuant to [Wis. Stat. § 938.315](#).

Dated \_\_\_\_\_

*(Firm/Office name)*  
Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]  
\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*  
*(Attorney's email address)*  
*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**D. Motion to Strike or, in the Alternative, to Make the Petition More Specific**  
**(Form CRM-0188) [§ 7.30]**STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



**MOTION TO STRIKE OR, IN THE  
ALTERNATIVE, TO MAKE THE  
PETITION MORE SPECIFIC <sup>[13]</sup>**

---

1. *(Juvenile's name)*, by *(his) (her)* attorney, moves the court to strike certain portions of the language of the petition filed against *(him) (her)* in this court on *(date)* or, in the alternative, to enter an order directing the attorney for the state to amend the petition to make it more specific.

2. The grounds for this motion are as follows.

a. On *(date)*, *(petitioner's name)* filed a petition alleging that *(juvenile's name)* was within the jurisdiction of this court for *(describe allegation)*. In addition, at line *(number)*, the petition further states, "*(quote from petition)*."

b. The petition presents a serious charge that may result in a disposition requiring *(juvenile's name)* to be removed from *(his) (her)* home.

c. As drafted, the charge and the supporting factual statement in the petition are so vague and indefinite that they fail to provide *(juvenile's name)* with sufficient notice of what conduct *(he) (she)* has committed that may result in an adjudication by this court.

d. Such failure to provide adequate notice is a denial of due process of law and is thus a violation of U.S. Const. amends. V, XIV; Wis. Const. art. I, ' 7; and [Wis. Stat. § 938.255](#).

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**E. Notice of Amendment of Petition (Form CRM-0189) [§ 7.31]**



STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



## NOTICE OF AMENDMENT OF PETITION <sup>[14]</sup>

---

TO: (Juvenile)  
(Attorney for juvenile)  
(Juvenile's parent, guardian, or legal custodian)  
(Court)

(District attorney's name), acting as a representative of the State of Wisconsin, (name of county) County, amends the petition filed on (date) and charging (juvenile's name) with delinquency.

This amendment, because it is made before the plea hearing, is authorized pursuant to [Wis. Stat. § 938.263\(2\)](#).

The changes in the petition include the following:

- a. *(List changes)*
- b.

A copy of the amended petition is attached to this notice.

Dated \_\_\_\_\_

[Type "Electronically signed by"  
 and your name on this line]  
 \_\_\_\_\_  
 District Attorney

\_\_\_\_\_  
 County

*(Attorney's address)*  
*(Attorney's email address)*  
*(Attorney's telephone number)*  
 State Bar No. \_\_\_\_\_

### V. [Standard Juvenile Court Forms](#)

## [§ 7.32]

Following is a list of standard juvenile court forms that may pertain to the material discussed in this chapter. For a more complete list of standard juvenile court forms that could pertain to the material discussed in the book, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose  |
|--------------------------|---------------------------|---|--|
| <a href="#">IW-1610</a>  | Ch. 48                    | Petition for Protection or Services—Chapter 48—ICWA                     | Formal request to invoke the court's jurisdiction to adjudicate an Indian child in need of protection or services under <a href="#">Wis. Stat.</a> ch. 48  |
| <a href="#">IW-1720</a>  | Both                      | Summons—ICWA  | Formal notice requiring a person to appear in court and respond to a citation or petition when the case involves a child or juvenile who is subject to ICWA  |
| <a href="#">IW-1721</a>  | Ch. 938                   | Petition for Protection or Services (Chapter 938)—ICWA                  | Formal request to invoke the court's jurisdiction to adjudicate an Indian juvenile in need of protection or services under <a href="#">Wis. Stat.</a> § 938.13(4), (6), (6m), or (7)                         |
| <a href="#">IW-1783A</a> | Ch. 48                    | Consent to Delegation of Powers under § 48.979 of an Indian Child       | Form signed by parent of an Indian child to consent to delegation of parental powers under <a href="#">Wis. Stat.</a> § 48.979   |
| <a href="#">IW-1783B</a> | Ch. 48                    | Certificate to Delegation of Powers under § 48.979 of an Indian Child   | Form signed by the court to certify delegation of parental powers under <a href="#">Wis. Stat.</a> § 48.979 in case involving an Indian child  |
| <a href="#">JC-1610</a>  | Ch. 48                    | Petition for protection or services (Chapter 48)                        | Formal request to invoke the court's jurisdiction to adjudicate a child in need of protection or services under <a href="#">Wis. Stat.</a> ch. 48  |
| <a href="#">JC-1612</a>  | Ch. 48                    | Petition for protection or care of an unborn child (Chapter 48)         | Petition for protection or care of an unborn child   |
| <a href="#">JD-1716</a>  | Both                      | Notice of rights and obligations  | Notice to child or juvenile and parents of their basic rights and obligations and possibility of disclosure of personal information to victims   |
| <a href="#">JD-1717</a>  | Both                      | Order to provide statement of income, assets, debts and living expenses | Court order to parents to provide a statement of income, assets, debts, and living expenses; required when a child may be placed outside his or her home in a court proceeding or when otherwise appropriate |
| <a href="#">JD-1718</a>  | Both                      | Statement of income, assets, debts and living expenses                  | Statement to provide financial information to the court; used when a child may be placed outside his or her home in a court proceeding or when otherwise appropriate   |

|                         |         |  |  |
|-------------------------|---------|--|--|
| <a href="#">JD-1720</a> | Both    | Summons  | Formal notice to an individual to appear in court and to respond to a citation or petition   |
| <a href="#">JD-1721</a> | Ch. 938 | Petition Under Ch. 938—delinquency/JIPS/civil law/ordinances | Formal request to invoke the court’s jurisdiction to adjudicate a juvenile as delinquent, JIPS, or for a civil-law or ordinance violation  |
| <a href="#">JD-1724</a> | Both    | Notice of hearing (juvenile)                                 | Notice informing individuals involved in a case of a scheduled court proceedings   |
| <a href="#">JD-1725</a> | Both    | Notice to school board                                       | Notice to school board of the filing of a felony delinquency petition; adjudication of delinquency; school attendance as condition of a CHIPS, JIPS, or delinquency dispositional order; and other information required to be provided to the school board |
| <a href="#">JD-1735</a> | Both    | Plea questionnaire/waiver of rights (CHIPS and JIPS)         | Statement signed by child, juvenile, parent, guardian, legal custodian, or Indian custodian entering an admission or no contest plea in a CHIPS or JIPS case and indicating an understanding of the rights waived by such a plea                           |
| <a href="#">JD-1737</a> | Ch. 938 | Plea questionnaire/waiver of rights (juvenile)               | Statement signed by a juvenile entering a plea, waiving rights, and indicating an understanding of the rights waived by such a plea  |
| <a href="#">JD-1748</a> | Both    | Order dismissing petition                                    | Format order dismissing petition in juvenile court   |
| <a href="#">JD-1757</a> | Both    | Notice of right to seek post-judgment relief                 | Notice to inform juvenile after disposition of the right to seek postdisposition relief, and to document that the juvenile’s lawyer has counseled the defendant about seeking postdisposition relief   |

## Supplement Chapter 8

### Plea Hearing

Book sections supplemented: [8.1](#), [8.24](#), and [8.48](#)

#### 8.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through May 30, 2024.

#### 8.24 Procedure

[Page 18: Replaced second-to-last paragraph in section](#)

In a case in which the prosecutor files the petition, a court cannot order a consent decree over the prosecutor's objection. *State v. C.G.B.* (In the Int of C.B.G.), [2017 WI App 32](#), [375 Wis. 2d 781](#), [896 N.W.2d 387](#).

## 8.48 Standard Juvenile Court Forms

[Page 31: Amended Name of Form and Purpose description for Form JD 1761 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|-------------|---------------------------|--|---|
| JD-1761     | Ch. 938                   | Judgment for unpaid restitution/ forfeiture/ surcharge | Court order granting a judgment against juvenile or parent with custody for unpaid restitution, forfeiture, and surcharge |

# Chapter 8

## Plea Hearing

### I. [Scope of Chapter](#)

#### [§ 8.1]

This chapter explains the procedures for plea hearings under the Wisconsin Children's Code ([Wis. Stat.](#) ch. 48) and the Wisconsin Juvenile Justice Code ([Wis. Stat.](#) ch. 938). A plea hearing corresponds to the initial appearance in a criminal case and has two purposes: to advise parents, expectant mothers, and children of their rights, and to determine how the parties wish to plead to the allegations in the petition. Under [Wis. Stat.](#) § 938.30(4), a juvenile can admit some of or all the facts alleged in the petition, deny the facts alleged in the petition, plead no contest to the allegations (if permitted by the court), or enter a plea of not responsible by reason of mental disease or defect. Under [Wis. Stat.](#) § 48.30(3), the nonpetitioning parties, the child (if at least 12 years old), and the expectant mother must state whether they wish to contest the petition.<sup>1</sup>

The plea hearing is usually the first time that the parent, expectant mother, or child appears in court on the petition. For a child or expectant mother held in custody, the prosecutor must file the petition by the time of the detention hearing, unless the court grants the prosecutor (1) one 72-hour extension to file the petition in cases for children in need of protection or services (CHIPS) or for unborn children in need of protection or services (UCHIPS), or (2) one 48-hour extension to file the petition, in delinquency cases and cases for juveniles in need of protection or services (JIPS). [Wis. Stat.](#) §§ 48.21(1), 48.213(1), 938.21(1); see [ch. 5](#) (physical custody).

This chapter begins by discussing procedural aspects of plea hearings in juvenile court. The chapter continues with a discussion of defense counsel's role in these plea hearings, noting potential problem areas and suggesting issues that defense counsel might raise. The limited plea bargaining available in the juvenile justice system is then explored, as well as the juvenile court's treatment of pleas and admissions. The chapter concludes with a discussion of a plea of not responsible by reason of mental disease or defect in a delinquency case.

### II. Procedure [§ 8.2]

#### A. Notice [§ 8.3]

After the filing of a CHIPS, UCHIPS, or delinquency petition, the court must give notice of the plea hearing to the child, the child expectant mother, the parent, guardian, or legal custodian, any foster parent or other physical custodian, and an unborn child's guardian ad litem. [Wis. Stat.](#) §§ 48.27(3), 938.27(3).

If the petition that was filed involves an Indian child who has been removed from the home of his or her parent or Indian custodian, or an unborn child who, when born, will be an Indian child, or an Indian juvenile who has been removed from the home of his or her parent or Indian custodian, the court must notify the Indian child's Indian custodian and tribe or the Indian tribe with which the unborn child may be eligible for affiliation when born. That Indian custodian or tribe may intervene at any point in the proceeding. [Wis. Stat. §§ 48.27\(3\)\(d\), 938.27\(3\)\(d\)](#).

After the filing of a UCHIPS petition involving an adult expectant mother, the court must notify the adult expectant mother, the physical custodian of the expectant mother, if applicable, and the unborn child's guardian ad litem. [Wis. Stat. § 48.27\(3\)\(c\)](#). The court must make every reasonable effort to identify and notify any person who has filed a declaration of paternal interest under [Wis. Stat. § 48.025](#), any person conclusively determined from genetic test results to be the father under [Wis. Stat. § 767.804\(1\)](#), any person who has acknowledged paternity of the child under [Wis. Stat. § 767.805\(1\)](#), and any person already adjudged the biological father of the child in a judicial proceeding, unless his rights have been terminated. [Wis. Stat. §§ 48.27\(5\), 938.27\(5\)](#). ([Wis. Stat. § 48.025](#) allows any person asserting his paternity of a nonmarital child who is not adopted or whose parents do not later marry each other to file a declaration of interest in matters affecting the child.)

The first notice to any interested party must be in writing and can have the petition attached. Subsequent notice can be given by telephone at least 72 hours before the time of the hearing. [Wis. Stat. §§ 48.27\(3\)\(a\), 938.27\(3\)\(a\)](#). A person giving notice by telephone must place a signed statement in the case file indicating the time of giving notice and the name of the person to whom the notice giver spoke on the telephone. [Wis. Stat. §§ 48.27\(3\)\(a\), 938.27\(3\)\(a\)](#). In CHIPS proceedings, the court must also notify the court-appointed special advocate (CASA) for the child. The same requirements for the initial written notice and subsequent 72-hour notice by telephone apply. [Wis. Stat. § 48.27\(3\)\(e\)](#). Pursuant to [Wis. Stat. § 938.27\(4m\)](#), the state must make a reasonable attempt to contact any known victim or alleged victim of a juvenile's act or alleged act to inform them of the right to receive notice of any hearing in the action.

**Note.** The 2020 “Marsy’s Law” amendment to the Wisconsin Constitution gives victims the constitutional right, upon request, to attend all proceedings involving the case, to receive reasonable and timely notification of proceedings, and to be heard in any proceeding during which a right of the victim is implicated. Wis. Const. art. I, § 9m(2)(e), (g), (j). Courts are still developing procedures for implementing Marsy’s Law in practice. See generally Rebecca M. Donaldson et al., *Marsy’s Law: Changes for Crime Victims*, Wis. Law., Sept. 2020, at 20.

The notice must contain the name of the child or expectant mother and the nature, location, date, and time of the hearing. [Wis. Stat. §§ 48.27\(4\)\(a\)1., \(b\)1., 938.27\(4\)\(a\)](#). The notice must also advise the child or expectant mother and any party of the right to counsel regardless of ability to pay. [Wis. Stat. §§ 48.27\(4\)\(a\)2., \(b\)2., 938.27\(4\)\(b\)](#).

Notice can be served by mail. [Wis. Stat. §§ 48.273\(1\)\(a\), 938.273\(1\)\(a\)](#). For service requirements in a CHIPS, UCHIPS, or nondelinquency JIPS case involving an Indian child who has been removed from the home of his or her parent or Indian custodian, or involving an unborn child who, when born, will be an Indian child, see [Wis. Stat. §§ 48.028\(4\)\(a\) and 938.028\(4\)\(a\)](#). [Wis. Stat. §§ 48.273\(1\)\(ag\), 938.273\(1\)\(ag\)](#). In cases involving Indian children, the timing of service of notice by mail to the parents, Indian custodian, and tribe will affect the timing of the first hearing. The initial hearing cannot be held until at least 10 days after the receipt of notice by the parent, Indian custodian, and tribe. If the parent, Indian custodian, or tribe requests additional time to prepare, the court must grant a continuance of up to 20 additional days for the initial hearing. [Wis. Stat. §§ 48.028\(4\)\(a\), 938.028\(4\)\(a\)](#).

If people who receive notice by mail fail to appear or otherwise to acknowledge service, the court generally must grant a continuance. [Wis. Stat. §§ 48.273\(1\)\(ar\), 938.273\(1\)\(ar\)](#). Service must then be made personally, unless the court deems it impracticable, in which case the court can order service by certified mail addressed to the last-known addresses of the individuals. [Wis. Stat. §§ 48.273\(1\)\(ar\), 938.273\(1\)\(ar\)](#). Compliance with [Wis. Stat. § 938.273\(1\)\(ar\)](#), regarding service of process, is necessary for the juvenile court to obtain personal jurisdiction in delinquency cases. See *State v. Aufderhaar*, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4 (interpreting [Wis. Stat. § 938.273\(1\)](#) (2001–02)). In so holding, the Wisconsin Supreme Court rejected the state’s argument that the summons for appearance, sent by regular mail and not returned, was sufficient notice. The court specifically noted that whether the juvenile had constructive or actual notice was irrelevant because personal jurisdiction depends on compliance with the procedures set out in [Wis. Stat. § 938.273\(1\)](#). *Aufderhaar*, 2005 WI 108, ¶ 22, 283 Wis. 2d 336. If personal service has not been achieved, the court must grant a continuance and order that service be made personally or by certified mail. *Id.*

The court might refuse to grant a continuance if the child is being held in secure custody. Under such circumstances, the court must order that service of notice of the next hearing be made personally or by certified mail to the person’s last-known address. [Wis. Stat. §§ 48.273\(1\)\(b\), 938.273\(1\)\(b\)](#). The court of appeals has held that, pursuant to the statute governing service, the state can obtain personal jurisdiction over members of the Menominee Indian tribe. *M.L.S. v. State (In the Int. of M.L.S.)*, 157 Wis. 2d 26, 31, 458 N.W.2d 541 (Ct. App. 1990).



Notice by mail generally must be sent at least seven days before the hearing. [Wis. Stat.](#) §§ 48.273(1)(c), 938.273(1)(c). If the person to receive notice of a CHIPS or JIPS hearing lives outside Wisconsin, notice must be sent at least 14 days before the hearing. If the person to receive notice of a CHIPS or JIPS hearing lives outside the state, notice must be sent 14 days before the hearing. [Wis. Stat.](#) §§ 48.273(1)(c)1., 938.273(1)(c)1. Personal service must occur at least 72 hours before the time of the hearing. [Wis. Stat.](#) §§ 48.273(1)(c), 937.273(1)(c). An unpublished court of appeals decision has held that the court cannot reduce the 72-hour period for giving notice. *W.W.C. v. State (In the Int. of D.L.C.)*, Nos. 90-2741-FT, 90-2742-FT, 1991 WL 101333 (Wis. Ct. App. Apr. 25, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In a CHIPS, UCHIPS, or nondelinquency JIPS case involving an Indian child who has been removed from the home of his or her parent or Indian custodian, and the person to be notified is the Indian child's parent, Indian custodian, or tribe, the person must receive notice by mail at least 10 days before the hearing. If that person's identity or location cannot be determined, the U.S. Secretary of the Interior instead must receive notice by mail at least 15 days before the hearing. [Wis. Stat.](#) §§ 48.273(1)(c)2., 938.273(1)(c)2.

In addition to the notice requirements, the statutes provide that the court in a CHIPS, UCHIPS, JIPS, or delinquency case can issue a summons requiring the person who has legal custody of the child or child expectant mother to appear personally and, if the court orders, to bring the child or child expectant mother before the court at the time and place stated in the notice. [Wis. Stat.](#) §§ 48.27(1)(a), 938.27(1). In addition, the court can issue a summons requiring the appearance of an adult expectant mother. [Wis. Stat.](#) § 48.27(1)(b). The court can also issue a summons requiring the appearance of any other person whose presence the court deems necessary. [Wis. Stat.](#) §§ 48.27(2), 938.27(2).

Any person who has been summoned to appear and who fails to do so without reasonable cause can be prosecuted for contempt of court. [Wis. Stat.](#) §§ 48.28, 938.28. The court can issue a *capias* for the parent or guardian or for the child if the summons cannot be served, if the parties served fail to obey the summons, or when the court concludes that service will prove ineffectual. [Wis. Stat.](#) §§ 48.28, 938.28.

## B. Appearances [§ 8.4]

The public is generally excluded from plea hearings in [Wis. Stat.](#) ch. 48 cases and in [Wis. Stat.](#) ch. 938 cases. [Wis. Stat.](#) §§ 48.299(1)(a), 938.299(1)(a); *see also* [Wis. Stat.](#) § 938.299(1)(ag), (am) (allowing foster parents and victims to attend plea hearings even if public hearing not held).

The public can attend plea hearings under [Wis. Stat.](#) ch. 938, however, for juveniles alleged delinquent either (1) for committing a violation that would be classified as a felony if committed by an adult, if the juvenile has been adjudicated delinquent previously; or (2) for committing certain violations specified in [Wis. Stat.](#) § 938.34(4h)(a), the serious juvenile offender program statute. [Wis. Stat.](#) § 938.299(1)(ar). [Wis. Stat.](#) § 938.299 provides two exceptions to this rule of public attendance. First, in a sexual assault case, the court must exclude the public if the victim objects. Second, the court has discretion to exclude the public from portions of the hearing dealing with sensitive personal matters of the juvenile or the juvenile's family that do not relate to the act or alleged act committed by the juvenile. *Id.*

Under certain circumstances, the court might exclude the child from a hearing. With respect to hearings (including plea hearings) on CHIPS petitions, the court can temporarily exclude the child after finding that doing so is in the best interest of the child and with the consent of the child's attorney or guardian ad litem. [Wis. Stat.](#) § 48.299(3). The court can exclude a child under seven years old from the entire hearing if the court finds that the child is too young to comprehend the hearing and that exclusion serves the best interest of the child. *Id.*

## C. Use of Restraints [§ 8.5]

Restraints, such as handcuffs and leg chains, generally cannot be used during a court proceeding and must be removed before a child enters the courtroom and appears before the court unless the court finds all of the following:

1. The use of restraints is necessary because of any of the following factors:
  - a. Restraints are necessary to prevent physical harm to the child or another person.
  - b. The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations, or the child presents a substantial risk of self-inflicting physical harm or inflicting physical harm on others as evidenced by recent behavior.
  - c. There is a founded belief that the child presents a substantial risk of flight from the courtroom.
2. There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including the presence of court personnel, law enforcement officers, or bailiffs.

[Wis. Stat.](#) §§ 48.299(2m)(b), 938.299(2m)(b).

The court must provide the child's counsel an opportunity to be heard before the court orders the use of restraints. If the child's counsel informs the court that the child wants to be present, the court may order a hearing by telephone or videoconference pursuant to [Wis. Stat.](#) § 48.299(5) or 938.299(5). If the court orders restraints, the court must make findings of fact in support of the order. [Wis. Stat.](#) §§ 48.299(2m)(c), 938.299(2m)(c).

#### D. Proceedings Conducted by Telephone or by Live Audiovisual Means [§ 8.6]

Under [Wis. Stat.](#) ch. 48, the court can permit any party to appear telephonically or by live audiovisual means. [Wis. Stat.](#) § 48.30(10).

Under [Wis. Stat.](#) ch. 938, courts can permit any party to participate in plea hearings telephonically or by live audiovisual means, subject to [Wis. Stat.](#) § 938.299(5). [Wis. Stat.](#) § 938.30(10); *see also* [Wis. Stat.](#) § 938.325 ("Proceedings by telephone or live audiovisual means"). Under [Wis. Stat.](#) § 938.299(5)(b), the juvenile or prosecutor can object to the use of telephone or live audiovisual means for "a critical stage of the proceedings," and the court must sustain the objection. "For all other such objections," the court must consider the factors outlined in [Wis. Stat.](#) § 885.56 to determine whether to permit use of videoconferencing technology. [Wis. Stat.](#) § 938.299(5)(b).

#### E. Time Periods [§ 8.7]

Strict time periods between critical stages of the adjudication process play a key role in protecting the due-process rights of parents and children. *T.H. v. La Crosse Cnty. (In the Int. of R.H.)*, 147 Wis. 2d 22, 33, 433 N.W.2d 16 (Ct. App. 1988), *aff'd by an equally divided court*, 150 Wis. 2d 432, 441 N.W.2d 233 (1989). The Wisconsin Supreme Court has held the plea hearing to be a critical stage in the adjudication process. *See State v. Woods*, 117 Wis. 2d 701, 736–38, 345 N.W.2d 457 (1984).

The court must hold the plea hearing within 30 days after the filing of the petition for a child or expectant mother not held in secure custody, and within 10 days if the child is held in secure custody. [Wis. Stat.](#) §§ 48.30(1), 938.30(1). These time periods apply in delinquency cases, JIPS cases, CHIPS cases, and UCHIPS cases. [Wis. Stat.](#) §§ 48.30(1), 938.30(1). In *T.H.*, the court held that the time periods are mandatory in both CHIPS and delinquency proceedings. *T.H.*, 147 Wis. 2d at 38.

**Note.** Different time periods apply in CHIPS cases, UCHIPS cases, and nondelinquency JIPS cases pursuant to [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) involving Indian children. If at any point in these proceedings the court determines or has reason to know that the child is an Indian child, the court must provide notice of the proceeding to the child's parent, Indian custodian, and tribe in the manner specified in [Wis. Stat.](#) §§ 48.028(4)(a) and 938.028(4)(a). The next hearing in the proceeding cannot be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe or, if the identity or location of the parent, Indian custodian, or tribe cannot be determined, until at least 15 days after receipt of the notice by the U.S. Secretary of the Interior. On request of the parent, Indian custodian, or tribe, the court must grant a continuance of up to 20 additional days to enable the requester to prepare for that hearing. [Wis. Stat.](#) §§ 48.299(9), 938.299(10).

Under both [Wis. Stat.](#) chs. 48 and 938, "[f]ailure ... to act within any time period ... does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction." [Wis. Stat.](#) §§ 48.315(3), 938.315(3). Furthermore, failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). If the court or a party fails to act within an applicable statutory time period, the court may order any of the following: dismissal without prejudice, release of the child from secure or nonsecure custody or from the terms of a custody order, and any other relief that the court considers appropriate. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In addition, in [Wis. Stat.](#) ch. 938 cases, courts can dismiss a petition with prejudice. [Wis. Stat.](#) § 938.315(3). This remedy is not available under [Wis. Stat.](#) ch. 48. *See* [Wis. Stat.](#) § 48.315(3); *see also* 2007 Wis. Act 199.

Certain time periods (outlined below) are excluded in computing time requirements. [Wis. Stat.](#) §§ 48.315(1), 938.315(1). Under other circumstances, a court can grant continuances only for good cause shown on the record before the expiration of the statutory time period in question. [Wis. Stat.](#) §§ 48.315(2), 938.315(2); *M.G. v. La Crosse Cnty. Hum. Servs. Dep't (In the Int. of G.H.)*, 150 Wis. 2d 407, 441 N.W.2d 227 (1989); *J.R. v. State (In re J.R.)*, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989); *T.H.*, 147 Wis. 2d at 39.

**Note.** The supreme court stressed the importance of making the good-cause finding on the record and in open court, in *Sheboygan County Department of Social Services v. Matthew S. (In re Termination of Parental Rights to Joshua S.)*, 2005 WI 84, ¶ 36, 282 Wis. 2d 150, 698 N.W.2d 631. The supreme court noted that the circuit court's grant of a continuance—by simply sending notice of a rescheduled fact-finding hearing—after both the state and counsel for the father had submitted letters requesting a rescheduled hearing

did not comport with these guidelines because there was no determination of good cause in open court or during a telephone conference on the record. *Id.* ¶ 24. For a helpful discussion of the proper evaluation of good cause, see *State v. Robert K. (In re Termination of Parental Rights to Moriah K.)*, 2005 WI 152, 286 Wis. 2d 143, 706 N.W.2d 257.

**Comment.** The time period for holding the plea hearing under [Wis. Stat.](#) §§ 48.30(1) and 938.30(1) differs from the time period for filing a petition under [Wis. Stat.](#) §§ 48.25(1) and 938.25(1). Under [Wis. Stat.](#) §§ 48.25(2) and 938.25(2)(a), a petition can be filed outside the time periods without the court's prior approval if the petition contains a statement explaining the reasons for the untimely filing. The court must then determine at the plea hearing whether good cause existed for the delay. To extend the time period for holding a plea hearing, the court must grant the extension *before* the expiration of the mandatory time periods; if the time periods have already expired, the court cannot find good cause at the plea hearing.

[Wis. Stat.](#) §§ 48.315(1) and 938.315(1) list specific periods that must be excluded in computing time under the Children's Code and Juvenile Justice Code.

1. Any period of delay is excluded that results from other actions concerning the child or the unborn child and the unborn child's expectant mother—including psychological evaluations, *see* [Wis. Stat.](#) §§ 48.295, 938.295; hearings related to the mental condition of the child, the child's parent, guardian, or legal custodian, or the expectant mother; waiver motions; and hearings on other matters. [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.; *see also* [Wis. Stat.](#) § 938.30(5); *Shawn B.N. v. State (In the Int. of Shawn B.N.)*, 173 Wis. 2d 343, 497 N.W.2d 141 (Ct. App. 1992); *J.R.*, 152 Wis. 2d at 606.

**Comment.** The term “waiver motion” appears in [Wis. Stat.](#) §§ 48.315 and 938.315 and nowhere else in either the Children's Code or the Juvenile Justice Code. Juvenile waiver proceedings, however, originate with a waiver *petition* under [Wis. Stat.](#) § 938.18(2), and the Children's Code does not have a counterpart to [Wis. Stat.](#) § 938.18. Defense counsel could argue that because the plea hearing must take place within 10 or 30 days after the filing of the petition (except in certain cases involving Indian children), the court must hold any waiver hearing in time to ensure a timely plea hearing under [Wis. Stat.](#) § 938.30(1). Because of the perfunctory nature of waiver hearings (the juvenile does not have a right to a jury trial, and the rules of evidence do not apply, *see infra* [ch. 14](#)), requiring that the waiver hearing occur within the 10-day or 30-day limit does not impose an onerous burden. (Of course, the juvenile or the state can seek a delay based on one of the other [Wis. Stat.](#) § 938.315(1) grounds.)

2. Any period of delay resulting from a continuance granted at the request or consent of the child *and* counsel, or of the unborn child's guardian ad litem, is excluded. [Wis. Stat.](#) §§ 48.315(1)(b), 938.315(1)(a)2.

**Comment.** The plain language of the statutes mandates that the child personally agree to the continuance. The child's silence when the court sets a date beyond the time periods does not constitute consent. *T.H.*, 147 Wis. 2d at 38–39.

3. Any period of delay caused by the disqualification of a judge, [Wis. Stat.](#) §§ 48.315(1)(c), 938.315(1)(a)3., or by a request for a substitution of judge filed by the juvenile, [Wis. Stat.](#) § 938.315(1)(a)3., is excluded.

**Note.** The time between the juvenile's request for a substitution and the assignment of the substitute judge, as well as the time required to schedule the plea hearing before the substituted judge, is excluded from the computation of the time period for holding a plea hearing. The delay must result from the disqualification and must be reasonable. *State v. Joshua M.W. (In the Int. of Joshua M.W.)*, 179 Wis. 2d 335, 507 N.W.2d 141 (Ct. App. 1993); *see also* *Shawn B.N.*, 173 Wis. 2d at 358. Docket congestion and subsequent reassignment to a different judge do not constitute disqualification of a judge under [Wis. Stat.](#) § 48.315(1)(c). *Brown Cnty. v. Shannon R. (In re Termination of Parental Rts/ to Daniel R.S.)*, 2005 WI 160, ¶¶ 87–89, 286 Wis. 2d 278, 706 N.W.2d 269.

4. Under [Wis. Stat.](#) ch. 938 only, any period of delay caused by “any other transfer of the case or intake inquiry to a different judge, intake worker or county” is also excluded. [Wis. Stat.](#) § 938.315(1)(a)3.
5. Any period of delay resulting from a continuance granted at the request of the prosecutor is excluded but only if
  - a. The prosecutor has exercised due diligence to obtain material evidence not then available, if reasonable grounds exist to believe that the evidence will be available at a later date; or
  - b. The prosecutor needs additional time to prepare the case, and the exceptional circumstances of the case justify the additional time. [Wis. Stat.](#) §§ 48.315(1)(d), 938.315(1)(a)4.

**Comment.** The prosecutor can request a continuance on these grounds only. The prosecutor must demonstrate that he or she exercised “due diligence,” but that the evidence (or witness) remains unavailable. The prosecutor must also demonstrate the materiality of the evidence. Although the statute does not define “due diligence,” the rules of evidence require diligent attempts to procure the attendance of a witness as a condition precedent to invoking the concept of unavailability in both civil and criminal cases. *La Barge v. State*, 74 Wis. 2d 327, 336, 246 N.W.2d 794 (1976). Therefore, examination of the case law defining “due diligence” under the rules of evidence might prove instructive. Both the hearsay statute and [Wis. Stat.](#) §§ 48.315(1)(d) and 938.315(1)(a)4. involve the same subject matter (unavailability of witnesses after due diligence to procure their attendance). Statutes relating to the same subject matter must be construed together. *Pulaski State Bank v. Kalbe*, 122 Wis. 2d 663, 665, 364 N.W.2d 162 (Ct. App. 1985); see also [Wis. Stat.](#) § 990.01(1) (stating that words and phrases that have a “peculiar meaning in the law shall be construed according to such meaning”).

A witness is considered available unless the prosecutor has made a good-faith but unsuccessful effort to procure the witness’s attendance at trial. *State v. Zellmer*, 100 Wis. 2d 136, 301 N.W.2d 209 (1981). Consequently, the prosecutor must state with specificity the efforts the prosecutor made to procure the witness’s attendance or to obtain the evidence.

A court can grant a continuance for further preparation only if the prosecutor demonstrates the “exceptional” circumstances of the case. Assertions by the prosecutor of inability to prepare because of workload do not suffice; something exceptional about the case itself must make adequate preparation impossible in the allotted time. This provision resembles [Wis. Stat.](#) § 971.10(3)(b)2., part of the “speedy trial” provisions of the rules of criminal procedure, which requires that the case be “so unusual and so complex ... that it is unreasonable to expect adequate preparation within the periods of time established by this section.”

6. In [Wis. Stat.](#) ch. 938 cases, any period of delay resulting from court congestion or scheduling is excluded. [Wis. Stat.](#) § 938.315(1)(a)5.
7. Any period of delay because of the imposition of a consent decree is excluded. [Wis. Stat.](#) §§ 48.315(1)(e), 938.315(1)(a)6.; see [Wis. Stat.](#) §§ 48.32, 938.32; see also *infra* §§ [8.22–43](#).
8. Any period of delay resulting from the absence or unavailability of the child or expectant mother is excluded. [Wis. Stat.](#) §§ 48.315(1)(f), 938.315(1)(a)7.

**Comment.** Published decisions have not addressed whether the state’s failure to produce a child held in secure custody for a hearing constitutes absence or unavailability under these provisions. Because the other circumstances listed under [Wis. Stat.](#) §§ 48.315(1) and 938.315(1) clearly exist because of conscious, affirmative action taken by the parties, defense counsel could argue that the state’s negligence in bringing a child to a hearing cannot constitute good cause under [Wis. Stat.](#) §§ 48.315 and 938.315. See also *Charleston D. v. State (In the Interest of Charleston D.)*, No. 92-2450-FT, 1993 WL 85379 (Wis. Ct. App. Jan. 26, 1993) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), implying that the state, although not acting in bad faith, was responsible for making sure that the child was produced for the hearing.

9. Any period of delay is excluded that results from the inability of the court to provide the child with notice of a hearing to extend the child’s dispositional order because the child ran away or otherwise made himself or herself unavailable to receive that notice. [Wis. Stat.](#) §§ 48.315(1)(fm), 938.315(1)(a)8.
10. A reasonable period of delay is excluded when the child is joined in a hearing with another child and the time periods for the other child have not expired, but only if good cause exists for not hearing the cases separately. [Wis. Stat.](#) §§ 48.315(1)(g), 938.315(1)(g).
11. Any period of delay resulting from the need to appoint a qualified interpreter is excluded. [Wis. Stat.](#) §§ 48.315(1)(h), 938.315(1)(a)9.
12. In a delinquency case, any period of delay is excluded that results from consultation by an intake worker, district attorney, or corporation counsel with tribal officials under [Wis. Stat.](#) § 938.24(2r) or 938.25(2g). [Wis. Stat.](#) § 938.315(1)(a)10.; see *supra* [ch. 4](#) (jurisdiction over certain Indian juveniles).
13. In CHIPS, UCHIPS, and nondelinquency JIPS cases, a reasonable period of delay, not to exceed 20 days, is excluded in a proceeding involving the out-of-home care placement of or termination of parental rights to a child whom the court knows or has reason to know is an Indian child, resulting from a continuance granted at the request of the child’s parent, Indian custodian, or tribe to enable the requester to prepare for the proceeding. [Wis. Stat.](#) §§ 48.315(1)(j), 938.315(1)(a)11.

The specific circumstances set out in [Wis. Stat.](#) §§ 48.315(1) and 938.315(1) do not limit the circuit court’s authority to grant a continuance under [Wis. Stat.](#) §§ 48.315(2) and 938.315(2). *M.G.*, 150 Wis. 2d at 418; *J.R.*, 152 Wis. 2d at 607. The specific grounds listed in the statutes can be raised, however, only in the manner provided by the statutes, because enumeration of the specific grounds in [Wis. Stat.](#) §§ 48.315(1) and 938.315(1) demonstrates legislative intent to exclude any alternative not enumerated. *C.A.K. v. State (In the Int. of*



*C.A.K.*), 154 Wis. 2d 612, 453 N.W.2d 897 (1990). For example, as noted above, continuances sought by the prosecutor for trial preparation can be granted only if the prosecutor demonstrates that the case involves exceptional circumstances.

[Wis. Stat.](#) §§ 48.315(2m) and 938.315(2m) recognize three situations in which the court's ability to grant a continuance or extend a time period is limited under [Wis. Stat.](#) chs. 48 and 938. The first situation stems from the requirement that the court find, within 60 days after the child is removed from the child's home, that reasonable efforts have been made to prevent the removal or that such efforts are not required because of a circumstance under [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. No continuance or extension of a time period may be granted and no period of delay can be excluded in computing the time periods under [Wis. Stat.](#) chs. 48 and 938 if the continuance, extension, or exclusion would prevent the court from making those findings within the 60 days. [Wis. Stat.](#) §§ 48.315(2m)(a), 938.315(2m)(a). At certain points during the pendency of a case, the court must make findings about the efforts the responsible department or agency has made to prevent removal of the child from the child's home. For example, the court must make such findings at a detention hearing (see [chapter 5](#), *supra*, for a discussion of detention hearings), a dispositional hearing (see [chapter 11](#), *infra*, for a discussion of dispositional hearings), and a change-in-placement hearing (see [chapter 12](#), *infra*, for a discussion of change-in-placement hearings).

**Note.** The circumstances of [Wis. Stat.](#) §§ 48.355(2d)(b)1.–5. and 938.355(2d)(b)1.–4. include that the parent has subjected the child to “aggravated circumstances,” including abandonment, torture, chronic abuse, or sexual abuse; the parent has committed certain specified crimes, such as attempted homicide, against a child of the parent; the parent has committed certain specified crimes, such as sexual assault, resulting in great bodily harm or substantial bodily harm against the child or another child of the parent; the parent has committed child trafficking against a victim who was the parent's child; the parental rights of the parent to another child have been involuntarily terminated; or (in a [Wis. Stat.](#) ch. 48 case) the parent relinquished custody of the child when the child was 72 hours old or younger.

The second situation, under [Wis. Stat.](#) §§ 48.315(2m)(b) and 938.315(2m)(b), stems from the timelines for permanency hearings under [Wis. Stat.](#) §§ 48.38(5m) and 938.38(5m). The court must find that the agency responsible for providing services has made reasonable efforts to achieve the permanency goal of the permanency plan within 12 months after the child was removed from the home or within 12 months after the court's last finding regarding reasonable efforts toward meeting the permanency goals. Therefore, no continuance or extension of a time period may be granted and no period of delay can be excluded in computing time periods if the continuance, extension, or exclusion would prevent the court from making those findings within the 12 months. Permanency hearings must take place for each child for whom a permanency plan is required no later than 12 months after the date the child was first removed from the child's home and every 12 months after a previous hearing, for as long as a child is placed outside the home. [Wis. Stat.](#) §§ 48.38(5m)(a), 938.38(5m)(a).

The third situation, under [Wis. Stat.](#) §§ 48.315(2m)(c) and 938.315(2m)(c), arises in cases involving extended out-of-home case placements for certain older children who are qualifying full-time students and have an individualized education program (IEP). See [Wis. Stat.](#) §§ 48.366, 938.366. A person who qualifies for such a placement (or the person's guardian) and the responsible agency may enter into a transition-to-independent-living agreement under which the person continues in out-of-home care and continues to be a full-time student under an IEP until the person attains 21 years of age, is granted a high school or high school equivalency diploma, or terminates the agreement. After evaluating the agreement under a best-interests standard, the court must then grant or deny an order to continue the placement “no later than 180 days after the date on which the transition-to-independent-living agreement is entered into.” [Wis. Stat.](#) §§ 48.366(3)(am)3., 938.366(3)(am)3. [Wis. Stat.](#) §§ 48.315(2m)(c) and 938.315(2m)(c) prohibit continuances, extensions, and delays of time periods that would cause the court to make the necessary best-interests finding under [Wis. Stat.](#) §§ 48.366(3)(am)3. or 938.366(3)(am)3. after the requisite 180-day period.

Failure to act within any time period in these three situations does not deprive the court of personal or subject-matter jurisdiction or of competency to exercise that jurisdiction. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). Rather, the court, while ensuring the safety of the child, can grant a continuance under [Wis. Stat.](#) § 48.315(2) or 938.315(2), dismiss the case without prejudice, release the child from secure or nonsecure custody or from the terms of a custody order, or grant any other relief that the court finds appropriate. [Wis. Stat.](#) §§ 48.315(2m)(b), 938.315(3). [Wis. Stat.](#) § 938.315(3) also permits dismissal with prejudice in [Wis. Stat.](#) ch. 938 cases. Failure to object to such a period of delay or continuance waives the time period that is the subject of the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3).

## F. Appraisal of Rights [§ 8.8]

At the commencement of the plea hearing, the court must advise the child, the expectant mother, the unborn child's guardian ad litem, and the parent, guardian, or legal custodian of the following rights:

1. The right to remain silent;

**Note.** Additionally, the court should inform nonpetitioning parties in CHIPS, UCHIPS, and nondelinquency JIPS cases that although they have the right to remain silent, the choice to remain silent may be relevant in the proceeding. [Wis. Stat.](#) §§ 48.243(1)(c), 938.243(1)(c).

2. The right to confront and cross-examine adverse witnesses;
3. The right to counsel;
4. The right to present and subpoena witnesses;
5. The right to a jury trial in CHIPS and UCHIPS cases; and
6. The right to have the allegations of the petition proved by clear and convincing evidence in CHIPS, UCHIPS, and nondelinquency JIPS cases, and beyond a reasonable doubt in delinquency cases.

[Wis. Stat.](#) §§ 48.243(1), 938.243(1); *see also supra* [ch. 2](#) (rights of children, parents, and expectant mothers). See [Wis. Stat.](#) §§ 48.028 and 938.028 for provisions concerning the rights to which an Indian custodian is entitled in an Indian child custody proceeding under the Indian Child Welfare Act.

In addition to informing the parties of their rights, the court must provide the parties with certain information related to the plea hearing. The court must inform the parent, legal custodian, guardian, or Indian custodian, the child or expectant mother, and the unborn child's guardian ad litem that if they do not request substitution of the judge before the end of the plea hearing, the right to substitution will be waived. [Wis. Stat.](#) §§ 48.30(2), 938.30(2). The Wisconsin Supreme Court has held that a court's failure to advise a child of the child's right of substitution can render a later admission involuntary. *State v. Kywanda F. (In the Int. of Kywanda F.)*, 200 Wis. 2d 26, 546 N.W.2d 440 (1996). In CHIPS and UCHIPS cases, the court must inform the parents, children, and expectant mothers that they must make any request for a jury trial before the end of the plea hearing. [Wis. Stat.](#) § 48.30(2). In delinquency and JIPS cases, the court must inform the juveniles and their parents, guardians, legal custodians, or Indian custodians that the court, not a jury, will do the fact-finding at the hearing. [Wis. Stat.](#) § 938.30(2).

The court must grant *nonpetitioning* parties a continuance of the plea hearing if they wish to consult an attorney concerning the request for jury trial in CHIPS and UCHIPS cases or a substitution of judge in CHIPS, UCHIPS, JIPS, and delinquency cases. [Wis. Stat.](#) §§ 48.30(2), 938.30(2).

**Comment.** If the court grants a continuance on this basis, the court should do so on the record and with the consent of the child and the child's counsel or of the unborn child's guardian ad litem. [Wis. Stat.](#) §§ 48.315(1)(b), 938.315(1)(a)2.

### III. Role of Defense Counsel [§ 8.9]

#### A. Substitution of Judge [§ 8.10]

##### 1. Nature of the Right [§ 8.11]

Before the plea hearing, counsel should discuss with the client whether to file a request for a substitution of judge. The right of substitution is a purely statutory right. *State v. B.S. (In the Int. of B.S.)*, 162 Wis. 2d 378, 404, 469 N.W.2d 860 (Ct. App. 1991). The right is also peremptory; the court must grant the request if timely made and in proper form.

The Law Revision Committee Note to [Wis. Stat.](#) § 48.29 indicates that the statute conforms to provisions that generally apply to civil, small claims, and criminal proceedings. ([Wis. Stat.](#) § 48.29 formerly applied to both CHIPS and delinquency cases. [Wis. Stat.](#) § 938.29 now governs judicial substitution in JIPS and delinquency cases.) The Wisconsin Legislature, by enacting [Wis. Stat.](#) §§ 48.29 and 938.29 (similar to [Wis. Stat.](#) § 971.20, part of the criminal statutes), created the right of substitution but did not require reasons for the substitution or proof of grounds. *State v. Holmes*, 106 Wis. 2d 31, 36 n.4, 315 N.W.2d 703 (1982).

**Comment.** The Wisconsin Supreme Court has noted that in creating a peremptory right, the legislature better served the purpose of the substitution statute—to preserve a defendant's right to a fair trial—because of the difficulties inherent in the former procedure, which required the defendant to make a prima facie showing of prejudice. *Id.* at 58–61. In *Holmes*, the court upheld the constitutionality of the statute against a challenge by the circuit courts that the statute violated the separation-of-powers doctrine. *Id.* at 74.

In CHIPS and UCHIPS proceedings and JIPS proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), and (7), the child, the child's parent, guardian, or legal custodian, the expectant mother, or the unborn child's guardian ad litem can file a written request with the clerk of court for a substitution of the judge assigned to the proceeding. [Wis. Stat.](#) §§ 48.29(1), 938.29(1). In delinquency proceedings or a JIPS action based on delinquency under [Wis. Stat.](#) § 938.13(12), only the juvenile can request a substitution of judge. [Wis. Stat.](#) § 938.29(1). In CHIPS and UCHIPS proceedings under [Wis. Stat.](#) ch. 48 or in proceedings under [Wis. Stat.](#) ch. 938, either adversary counsel or the guardian ad litem for a person entitled to substitution of judge can file the request. [Wis. Stat.](#) §§ 48.29(1), 938.29(1).

In delinquency proceedings in which a petition seeking waiver of juvenile jurisdiction has also been filed, the juvenile must file the request for substitution before the close of the working day preceding the day scheduled for the waiver hearing. [Wis. Stat.](#) § 938.29(2). The judge can, however, allow a request for substitution on the day of the waiver hearing. *Id.* In one unpublished opinion, the court of appeals held that if a child makes a request on the day of the hearing, the judge can require the child to justify the "untimely" request. *T.D.O. v. State (In the Int. of T.D.O.)*, No. 92-0848, 1992 WL 276903 (Wis. Ct. App. July 2, 1992) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). If the juvenile makes the request after the waiver hearing, the judge who presided over the waiver hearing can also conduct the plea hearing. [Wis. Stat.](#) § 938.29(2); *see also infra* [ch. 14](#) (waiver into adult court).

The right of substitution has limits. In CHIPS and UCHIPS cases, only one request can be filed in a proceeding, and the request can name only one judge. [Wis. Stat.](#) § 48.29(1). A juvenile in delinquency and JIPS proceedings and the parent in JIPS cases not based on delinquency cannot request a substitution of judge if the judge assigned to the case has entered a delinquency or JIPS dispositional order with respect to the juvenile in a previous [Wis. Stat.](#) ch. 48 or 938 proceeding or if the juvenile or parent has previously requested a substitution of judge in a prior delinquency or JIPS proceeding. [Wis. Stat.](#) § 938.29(1g).

## 2. Procedure [§ 8.12]

Upon receiving the request for substitution, the clerk must immediately contact the judge whose substitution has been requested so that the judge can determine whether the substitution request is timely and whether it appears in proper form. [Wis. Stat.](#) §§ 48.29(1m), 938.29(1m). In an unpublished opinion, the court of appeals construed [Wis. Stat.](#) § 48.29 in the same manner as the substitution-of-judge provision in the criminal statutes, [Wis. Stat.](#) § 971.20. This construction gives the defendant a reasonable period, even after the statutory time period has expired, in which to file a substitution request after learning which judge is assigned to the trial. *S.I. v. Manitowoc Cnty. Dep't of Soc. Servs. (In the Int. of S.I.)*, No. 84-1311, 1984 WL 180074 (Wis. Ct. App. Nov. 14, 1984) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In *S.I.*, the child also challenged the denial of her substitution request, based on the court's failure to comply with the county's judicial assignment plan. Although the court in *In the Interest of S.I.* held that the child had waived the objection, defense counsel might consider making an argument similar to the child's interesting and creative argument in those cases in which the usual procedure for granting substitution requests does not appear to have been followed. The same argument would apply to substitution under [Wis. Stat.](#) § 938.29.

**Comment.** The court of appeals has held that waiver applies to the law of judicial substitution. *State v. Hollingsworth*, 160 Wis. 2d 883, 891, 467 N.W.2d 555 (Ct. App. 1991). Therefore, participation in a hearing conducted by the judge for whom substitution is sought, after the filing of a substitution request, might constitute waiver. *Id.* In an unpublished opinion, the court of appeals applied the rationale of *Pure Milk Products Cooperative v. National Farmers Organization*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974), to CHIPS proceedings, holding that participation in a contested matter implicating the merits of the action renders an otherwise timely request untimely. *Raquel L. v. Michael L. (In the Int. of Raquel L.)*, No. 92-1830, 1992 WL 355136 (Wis. Ct. App. Sept. 24, 1992) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The court held, however, that participation in a detention hearing did not qualify as a "preliminary contested matter" subject to the *Pure Milk Products* rationale because the only issue contested at the hearing was detention of the child. In addition, a petition had not yet been filed, so the action had not formally commenced. *Id.* (quoting *D.W.B. v. State (In the Int. of D.W.B.)*, 158 Wis. 2d 398, 462 N.W.2d 520 (1990)); *see also supra* [ch. 7](#) (filing of a petition).

Under this rationale, then, if a matter contested at the plea hearing implicates the merits of the case, the court could hold a substitution request untimely even if filed before the end of the plea hearing (or, if the court granted an adjournment for further consultation between client and attorney, before the end of the adjourned plea hearing). If any possibility exists that a request for substitution might be filed, counsel should not participate in any preliminary contested matters presided over by the judge for whom substitution is requested.

If the judge named in the substitution request determines that the request is not timely or in proper form, defense counsel may seek review of that determination by the chief judge of the judicial administrative district. *State ex rel. Mateo D.O. v. Circuit Ct.*, 2005 WI App 85, 280 Wis. 2d 575, 696 N.W.2d 275; *see also* [Wis. Stat.](#) § 801.58(2).

## B. Jury Trial Request [§ 8.13]



As noted above, in CHIPS and UCHIPS cases, a parent, guardian, legal custodian, or Indian custodian, the child, an expectant mother, or an unborn child's guardian ad litem must request a jury trial before the end of the plea hearing or else waive it. [Wis. Stat. § 48.30\(2\)](#). The statute allows waiver because the right to a jury trial in CHIPS and UCHIPS cases is neither constitutional nor fundamental. [N.E. v. Wisconsin Dep't of Health & Soc. Servs. \(In the Int. of N.E.\)](#), 122 Wis. 2d 198, 361 N.W.2d 693 (1985). Although [N.E.](#) concerned a child's waiver of jury trial in a delinquency proceeding, the decision rested on the language of [Wis. Stat. § 48.31\(2\)](#), which applied to CHIPS proceedings as well. [Wis. Stat. § 938.31\(2\)](#) establishes that all hearings under [Wis. Stat. ch. 938](#) are to the court.

Once made, the jury trial demand must be withdrawn knowingly and voluntarily. [N.E.](#), 122 Wis. 2d at 208. The party must withdraw the demand personally, not by counsel on behalf of the party. The party can withdraw the jury demand in writing, but the party must file the writing with the court, and the writing must state that the party has made the decision "knowingly and voluntarily after receiving the advice of counsel." *Id.* The party can also withdraw the demand in open court, in which case the court must personally address the party to make certain that the party knowingly and voluntarily seeks withdrawal of the jury trial demand. *Id.*

## C. Motions to Dismiss the Petition [§ 8.14]

### 1. Time Period Violations [§ 8.15]

With a petition untimely filed, *see supra* [ch. 7](#) (filing of a petition), or with a plea hearing not held within the statutory time, *see supra* [§ 8.7](#), defense counsel should prepare to challenge the violation at the plea hearing. In delinquency, JIPS, and CHIPS proceedings, and in extension cases (i.e., cases to extend dispositional orders in such proceedings), a failure to object waives any challenge to the court's competency. *See* [Wis. Stat. §§ 48.24\(5\), 48.245\(7\), 48.25\(2\), 48.315\(3\), 48.365\(6\), 938.24\(5\), 938.245\(7\)\(a\), 938.25\(2\)\(a\), 938.315\(3\), 938.365\(6\)](#).

In delinquency and JIPS cases, dismissal with prejudice is one of the remedies for a time-period violation. [Wis. Stat. § 938.315\(3\)](#). Other remedies under both [Wis. Stat. chs. 48 and 938](#) include granting a continuance for good cause, dismissing the petition without prejudice, releasing the juvenile from secure or nonsecure custody or from the terms of a custody order, or granting any other appropriate relief. [Wis. Stat. §§ 48.315\(3\), 938.315\(3\)](#). When determining which remedy to apply, the court must assure the safety of the child. [Wis. Stat. §§ 48.315\(3\), 938.315\(3\)](#).

If the petitioner has filed a late petition with a statement of reasons for the delay, defense counsel can request that the court grant "appropriate relief" as provided in [Wis. Stat. §§ 48.315\(3\) and 938.315\(3\)](#). [Wis. Stat. §§ 48.25\(2\), 938.25\(2\)\(a\)](#).

### 2. Challenges to Sufficiency [§ 8.16]

Defense counsel should prepare to challenge the sufficiency of the petition, either for failing to comply with the statutory form and content requirements of [Wis. Stat. § 48.255 or 938.255](#) or for failing to provide adequate notice. *See* [chapter 7, supra](#), for a discussion of challenges to CHIPS, UCHIPS, JIPS, and delinquency petitions.

## D. Effect of Entering Plea on Waiver [§ 8.17]

When preparing for the plea hearing in a delinquency proceeding, defense counsel should remember that if the state has not filed a petition seeking waiver of juvenile court jurisdiction under [Wis. Stat. § 938.18](#) and the juvenile enters a plea at the hearing, the state cannot seek waiver under [Wis. Stat. § 938.18\(2\)](#).

**Caution.** If the juvenile enters a denial at the plea hearing and the juvenile later turns 17 before an adjudication, a petition for waiver can still be filed at any time before the adjudication. [Wis. Stat. § 938.18\(2\)](#).

## E. Placement of Child or Expectant Mother Pending Proceedings [§ 8.18]

For a child or expectant mother held in custody or in a placement outside the home, defense counsel can raise the issue of the placement. *See* [chapter 5, supra](#), for a discussion of counsel's role in arguing for an alternative placement.

## IV. Plea Bargaining [§ 8.19]

## A. Nature of Plea Bargaining [§ 8.20]

The U.S. Supreme Court has called plea bargaining (or “[t]he disposition of criminal charges by agreement between the prosecutor and the accused”) “an essential component of the administration of justice.” *Santobello v. New York*, 404 U.S. 257, 261 (1971). Plea bargaining leads to prompt and final resolution of cases, shortens the unproductive time that a defendant spends in pretrial incarceration, protects the public, and enhances rehabilitation of the defendant by shortening the time between charge and disposition. *Id.* These benefits, however, presuppose fairness in the negotiations between the defendant and the prosecution. *Id.*

Generally, plea bargaining in delinquency cases is an accepted practice. See *R.W.S. v. State (In the Interest of R.W.S.)*, 162 Wis. 2d 862, 471 N.W.2d 16 (1991), which approved the practice of ordering restitution for “read-in” offenses, a dispositional alternative not specifically authorized then under the Children’s Code (nor now under the Juvenile Justice Code). The IJA-ABA Joint Commission on Juvenile Justice Standards’ publication, *Standards Relating to Prosecution*, approves the use of plea bargaining in delinquency cases, including agreements not to waive a child into adult court in exchange for the child’s admission to the delinquency petition. IJA-ABA Joint Comm’n on Juv. Just. Standards, *Standards Relating to Prosecution* § 5.1 commentary, at 63–66 (1980). This position rests on the premise that prosecutors will not overcharge or otherwise abuse the process (e.g., by filing a waiver petition to use as a bargaining chip) because of their “duty not to lose sight of the philosophy and purpose of the family court.” *Id.* at 65. Yet if overcharging exists as a real possibility, one might question overreliance on a prosecutor’s grace to prevent abuses in charging.

**Note.** It would be prudent for defense counsel to be aware of the wishes of the victim or complaining witness in preparing for the plea hearing. See generally Wis. Const. art. I, § 9m(2)(i) (providing that, upon request, crime victim has right “to be heard in any proceeding during which a right of a victim is implicated,” including a plea hearing). It would not be unheard of for a court to reject a plea agreement based on statements of a victim in court (especially if the victim disagreed with the plea agreement) and a finding that the agreement is not in the public’s interest. See *State v. Conger*, 2010 WI 56, ¶ 43, 325 Wis. 2d 664, 797 N.W.2d 341 (holding that circuit court has power to reject plea agreement that is not in public interest).

CHIPS cases present a different situation altogether. Unlike in delinquency cases, jurisdiction in CHIPS cases rests on one or more of 15 distinct grounds under [Wis. Stat.](#) § 48.13, and grounds for CHIPS depend on the particular facts of the case.

While one year is the maximum term, regardless of the CHIPS ground, for a disposition that places or continues placement of a child in the child’s home, a disposition that places or continues placement of a child outside the home can have a longer maximum term. In those cases, the disposition can terminate at the last to occur of the following, unless the judge specifies a shorter period of time: (1) the date that is one year after the date on which the dispositional order is granted; (2) the date on which the child attains age 18; (3) the date on which the child is granted a high school or high school equivalency diploma or the date on which the child attains age 19, whichever occurs first, if the child is a full-time student at a secondary school or its vocational or technical equivalent and is reasonably expected to complete the program before attaining age 19; or (4) the date on which the child is granted a high school or high school equivalency diploma or the date on which the child attains age 21, whichever occurs first, if the child is a full-time student at a secondary school or its vocational or technical equivalent and if an individualized education program (IEP) is in effect for the child. [Wis. Stat.](#) § 48.355(4).

Disputes at disposition usually arise over placement of the child. If the prosecutor believes that the best interests of the child require placement outside the child’s home, making this placement the subject of negotiation in exchange for the parent’s admission to the allegation in the petition seems an unlikely development. On the other hand, from a prosecutor’s point of view, the parent’s willingness to forgo a trial might indicate a willingness to remedy conditions that prompted the filing of the petition. In addition, the parent might have other reasons for admitting the allegations in the petition, quite apart from the “deal” that the parent has negotiated with the prosecution.

## B. Role of Defense Counsel [§ 8.21]

Defense counsel needs to understand the differences between plea bargaining in the criminal justice system and the limited plea bargaining available in the juvenile justice system. The child, parent, or expectant mother decides whether to waive the right to a trial and admit the allegations in the petition. Here, defense counsel has two roles: to advise the client of the advantages and disadvantages of entering an admission and to negotiate the best possible plea bargain for the client.

In advising a client of the costs and benefits of a guilty plea, counsel must consider the likelihood of winning at trial and the advantages gained by a guilty plea. See generally Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* (2014). The advantages depend in part on the type of deal defense counsel can make. Whether an agreement for the dismissal of charges or a particular disposition constitutes a good deal for the client depends on the individual case, examined in light of the limited nature of plea bargaining in juvenile cases. However, one statutorily created type of plea bargain—the consent decree—can result in the petition’s dismissal with prejudice.

## C. Consent Decrees [§ 8.22]

### 1. What Is a Consent Decree [§ 8.23]

[Wis. Stat.](#) § 48.32 allows for consent decrees in CHIPS and UCHIPS cases, while [Wis. Stat.](#) § 938.32 allows for consent decrees in JIPS and delinquency cases. A consent decree resembles a deferred prosecution agreement in a criminal proceeding under [Wis. Stat.](#) §§ 971.37–40: each involves the suspension of proceedings with court-ordered terms and conditions that, if fulfilled by the parent, child, or expectant mother, result in dismissal of the petition with prejudice. *See* [Wis. Stat.](#) §§ 48.32(1), 938.32(1), (4); *see also* [ch. 6](#), *supra* (discussing deferred prosecution agreements under [Wis. Stat.](#) chs. 48 and 938).

Consent decrees are voluntary. Therefore, children (in CHIPS cases, children older than 12 years of age), expectant mothers, and all other parties subject to the consent decree, including the petitioner and, in UCHIPS cases, an unborn child’s guardian ad litem, must agree to the consent decree. [Wis. Stat.](#) §§ 48.32(1)(a), 938.32(1)(a).

Special rules apply to consent decrees involving Indian children in CHIPS, UCHIPS, and nondelinquency JIPS cases in which the child is placed or living outside the home. *See* [Wis. Stat.](#) §§ 48.32(1)(d), 938.32(1)(e).

### 2. Procedure [§ 8.24]

Consent decrees can be entered into any time after the filing of a CHIPS, UCHIPS, JIPS, or delinquency petition and before entry of the judgment. [Wis. Stat.](#) §§ 48.32(1)(a), 938.32(1)(a). In delinquency cases and JIPS cases based on delinquency, the court must allow a victim (or a family member of a homicide victim) to make an oral or written statement relevant to the consent decree. The court may allow any other person to make such a statement. *See* [Wis. Stat.](#) § 938.32(1)(b). In addition, in delinquency and JIPS delinquency cases, the prosecutor must offer all victims an opportunity to confer with the prosecutor about the consent decree. [Wis. Stat.](#) § 938.32(1)(am).

The juvenile court may suspend proceedings and order the child or expectant mother placed under supervision in

1. The child’s or expectant mother’s own home, or
2. The child’s or expectant mother’s present placement.

[Wis. Stat.](#) §§ 48.32(1)(a), 938.32(1)(a).

The court can establish terms and conditions applicable to the child, the expectant mother, or the parent, guardian, or legal custodian. [Wis. Stat.](#) §§ 48.32(1)(a), 938.32(1)(a). As noted below, the statutes specify some conditions. The court, however, has authority to set other reasonable conditions. *See* [Wis. Stat.](#) §§ 48.345(2), 938.34(2)(a), 938.345(1) (allowing court to set “reasonable rules” as part of CHIPS, UCHIPS, JIPS, or delinquency disposition). The consent decree must be in writing and given to all the parties. [Wis. Stat.](#) §§ 48.32(1)(a), 938.32(1)(a).

If the consent decree places a child in a residential care center for children and youth, group home, or shelter care facility certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, the “qualified individual,” *see* [Wis. Stat.](#) §§ 48.02(14k), 938.02(14m), must conduct a “standardized assessment,” *see* [Wis. Stat.](#) §§ 48.02(17t), 938.02(17t), that includes information about the following:

1. Whether the proposed placement will provide the child with the most effective and appropriate level of care in the least restrictive environment;
2. How the placement is consistent with the child’s short-term and long-term goals, as specified in the permanency plan;
3. The reasons why the child’s needs can or cannot be met by the child’s family or in a foster home; and

**Note.** A shortage or lack of foster homes is not an acceptable reason for determining that the child’s needs cannot be met in a foster home.

4. The placement preference of the family permanency team under [Wis. Stat. § 48.38\(3m\)](#) or [938.38\(3m\)](#) and, if that preference is not the placement recommended by the qualified individual, why that recommended placement is not preferred.

[Wis. Stat. §§ 48.32\(1\)\(ar\), 938.32\(1\)\(br\)](#). The responsible agency then submits the standardized assessment and the qualified individual's recommendation to the court and to all parties to the consent decree, no later than the time the consent decree is entered or, if not available by that time, no later than 30 days after the date on which the placement is made. [Wis. Stat. §§ 48.32\(1\)\(ar\), 938.32\(1\)\(br\)](#).

According to at least one unpublished opinion, the circuit court can enter a consent decree without approval of the prosecutor. *State v. Heather M.M. (In the Int. of Heather M.M.)*, No. 01-1407, 2001 WL 1169870 (Wis. Ct. App. Oct. 4, 2001) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

The court can amend a child's consent decree if the parties agree. [Wis. Stat. §§ 48.32\(1\)\(am\), 938.32\(1\)\(bm\)](#). An amended consent decree may revise any terms or conditions of the original consent decree, including changing a child's placement. An amended consent decree cannot extend the expiration date of the original consent decree.

### 3. Terms and Conditions of a Consent Decree [§ 8.25]

#### a. Volunteers in Probation [§ 8.26]

A "volunteers in probation" program allows for volunteer supervision of an individual. See [Wis. Stat. § 973.11](#). For a juvenile alleged to have committed a misdemeanor, the consent decree can provide for the juvenile's placement with a volunteers in probation program with "reasonable and appropriate" conditions set by the court. [Wis. Stat. § 938.32\(1d\)](#). (A consent decree can include this option only if such a program, approved by the chief judge of the judicial administrative district, already exists in the juvenile's county of residence. *Id.*) Conditions can include a directive that the volunteer provide the juvenile with a role model, informal counseling, and monitoring of the conditions set by the court. [Wis. Stat. § 938.32\(1d\)\(a\)](#).

**Comment.** Although consent decrees and deferred prosecution agreements, see [Wis. Stat. § 938.245](#), share many similarities, see [ch. 6](#) (intake inquiry), the consent decree has more formality because the court orders the terms and conditions. For example, although a deferred prosecution agreement can include a *request* to the volunteer to counsel and monitor the progress of the child, [Wis. Stat. § 938.245\(2\)\(a\)7.](#), the consent decree can include a court *directive* for monitoring and counseling.

#### b. Youth Report Centers [§ 8.27]

As a condition of a consent decree a juvenile can be ordered to report to a youth report center whenever the juvenile is not under immediate adult supervision. The juvenile can be ordered to participate in any programming the center provides, including social, behavioral, academic, and community service. [Wis. Stat. § 938.32\(1p\)](#).

#### c. Drug and Alcohol Treatment and Education [§ 8.28]

If the petition alleges that the juvenile committed a violation of the Uniform Controlled Substances Act, [Wis. Stat. ch. 961](#), and if the multidisciplinary screen shows the juvenile to be at risk of having needs and problems related to the use of drugs or alcohol, the court can set a condition that the juvenile participate in outpatient treatment. [Wis. Stat. § 938.32\(1g\)\(a\)](#); see also [Wis. Stat. §§ 48.24\(2\), 938.24\(2\)](#) (multidisciplinary screens). The court can impose this condition only after receiving the result of a drug and alcohol assessment conducted under the criteria established by the Department of Children and Families (DCF), see [Wis. Stat. §§ 938.32\(1g\)\(a\), 938.547\(4\)](#), and completed pursuant to a court-ordered examination. [Wis. Stat. § 938.32\(1g\)\(a\)](#). [Wis. Stat. § 938.295\(1\)](#) provides that the court can order a juvenile to undergo a drug or other alcohol abuse assessment. See *infra* [ch. 9](#) (discovery and other motion practice).

In addition, before the court can order this condition, the juvenile (if 12 years of age or older) or the parent, guardian, or legal custodian (if the juvenile is younger than 12 years of age) must execute an informed-consent form indicating that he or she has knowingly and voluntarily entered into the consent decree containing this specific provision. [Wis. Stat. § 938.32\(1r\)](#). To ensure an informed consent (i.e., a knowing and voluntary consent), the consent form should include a statement that the juvenile and parent understand the consequences of noncompliance with treatment.

The court can also order the juvenile to participate in a court-approved drug and alcohol abuse educational program. [Wis. Stat. § 938.32\(1g\)\(b\)](#).

#### d. Restitution [§ 8.29]

If the petition alleges that the juvenile committed a delinquent act resulting in (1) damage to the property of another or (2) actual physical injury to another *excluding pain and suffering*, the consent decree can provide that the juvenile repair the damage to property or make any reasonable restitution for the property damage or personal injury either in the form of cash or, if the victim agrees, the performance of services for the victim, or both. [Wis. Stat. § 938.32\(1t\)\(a\)1](#). The consent decree can also require the parent of the juvenile to make restitution for the damage or injury. *See* [Wis. Stat. § 938.32\(1t\)\(a\)1m](#). The court can order this remedy after determining that it will benefit the juvenile's well-being and behavior and after taking into account the victim's well-being and needs. [Wis. Stat. § 938.32\(1t\)\(a\)1](#). Any consent decree providing for restitution as a condition must include a finding that the juvenile alone has the ability to pay or is physically able to perform the services, and can allow for payment until the expiration date of the agreement. *Id.*

A juvenile under 14 years of age who participates in a restitution project provided by the county can be employed, or perform any duties, under any circumstances allowed under [Wis. Stat. ch. 103](#) for children 14 or 15 years old. [Wis. Stat. § 938.32\(1t\)\(a\)2](#). [Wis. Stat. ch. 103](#) regulates employment, including employment of children.

A consent decree cannot require a juvenile under 14 years of age to make more than \$250 in restitution or to perform more than 40 hours of services for the victim as restitution. [Wis. Stat. § 938.32\(1t\)\(a\)3](#).

#### e. Supervised Work Program [§ 8.30]

A consent decree can provide that a juvenile participate in a supervised work program or other community service work. [Wis. Stat. § 938.32\(1t\)\(b\)](#). A supervised work program provides the juvenile with work in exchange for reasonable compensation (reflecting the reasonable market value of the work performed) or with uncompensated community service work. [Wis. Stat. § 938.34\(5g\)\(am\)](#). If the supervising county department, community agency, public agency, or nonprofit charitable organization and the person to whom restitution is owed all agree, a juvenile can do community service work as an alternative to restitution. *Id.*

The supervised work program must be administered by the county department or by a community agency approved by the court. [Wis. Stat. § 938.34\(5g\)\(a\)](#). Any other community service work must be administered by a public agency or nonprofit charitable organization approved by the court. *Id.*

The program or community service work must (1) be "constructive," (2) promote the juvenile's rehabilitation, (3) be age appropriate, and (4) accord with the juvenile's physical ability. [Wis. Stat. § 938.34\(5g\)\(b\)](#). The program or community service work must be combined with counseling. *Id.* The program cannot conflict with the juvenile's school schedule. *Id.* The amount of work required must reasonably relate to the seriousness of the offense. *Id.*

A juvenile participating in a supervised work project or community service can be employed or perform any duties under any circumstances allowed under [Wis. Stat. ch. 103](#) for children 14 or 15 years old. [Wis. Stat. § 938.34\(5g\)\(c\)](#).

A consent decree cannot require a juvenile younger than 14 years of age to perform more than 40 total hours of community service work. [Wis. Stat. § 938.34\(5g\)\(d\)](#).

#### f. Teen Court Program [§ 8.31]

For a juvenile alleged to have committed a delinquent act that would qualify as a misdemeanor if committed by an adult, [Wis. Stat. § 938.32\(1m\)\(b\)](#), the juvenile court can place the juvenile in a teen court program as a condition of a consent decree, but only if all the following conditions exist:

1. The chief judge of the judicial administrative district has approved a teen court program in the county where the juvenile resides, and the court has determined that the juvenile's participation in the program will likely benefit the juvenile and the community. [Wis. Stat. § 938.32\(1m\)\(a\)](#).
2. In open court and with the parent, guardian, or legal custodian present, the juvenile enters an admission or no-contest plea to the allegations in the petition. [Wis. Stat. § 938.32\(1m\)\(c\)](#).
3. The juvenile has not successfully completed the teen court program in the two years before the alleged delinquent act. [Wis. Stat. § 938.32\(1m\)\(d\)](#).



### g. School Attendance [§ 8.32]

If the petition alleges that the juvenile is habitually truant from school under [Wis. Stat. § 938.13\(6\)](#), the court can order that the juvenile's parent, guardian, or legal custodian attend school with the juvenile. [Wis. Stat. § 938.32\(1v\)](#).

### h. Work for Graffiti Violations [§ 8.33]

If the petition alleges that the juvenile committed an act of graffiti, in violation of [Wis. Stat. § 943.017](#), and the juvenile is at least 10 years old, the court may order the juvenile to participate for not less than 10 hours nor more than 100 hours in a supervised work program under [Wis. Stat. § 938.34\(5g\)](#) or perform not less than 10 hours nor more than 100 hours of community service. [Wis. Stat. § 938.32\(1x\)](#). A juvenile who is less than 14 years old, however, cannot be required to perform more than 40 hours of work or community service. *Id.*

### i. Court-Appointed Special Advocate (CASA) [§ 8.34]

As a condition of a consent decree in CHIPS and UCHIPS cases, the court can request that a CASA perform certain information-gathering activities. Pursuant to [Wis. Stat. § 48.236](#) and subject to the memorandum of understanding between the court and the CASA program, the CASA can perform such duties as reviewing records relating to the child, observing the child in the child's home, interviewing the child and adults involved in the child's care, and preparing a report to the court presenting this information. [Wis. Stat. § 48.32\(1b\)](#); *see* [Wis. Stat. § 48.236\(3\), \(4\)](#) (describing CASA activities and authority).

## 4. Findings Required When Child Living Outside the Home [§ 8.35]

When the consent decree is entered into, if the child is placed outside the child's home under a voluntary agreement, *see* [Wis. Stat. § 48.63](#), or is otherwise living outside the home without a court order and the consent decree maintains the child in that placement or other living arrangement, or if an amended consent decree changes the placement of the child from a placement in the child's home to a placement outside the child's home, the consent decree must include the following:

1. A finding that continued placement of the child in the home is contrary to the welfare of the child, [Wis. Stat. §§ 48.32\(1\)\(b\)1.a., 938.32\(1\)\(c\)1.a.](#);
2. A finding as to whether the department or agency responsible for providing services to the child has made reasonable efforts to prevent removal of the child from the home, while ensuring that the child's health and safety are paramount concerns, unless the court has determined such efforts are not required because any circumstance of [Wis. Stat. § 48.355\(2d\)\(b\)1.-5.](#) or [938.355\(2d\)\(b\)1.-4.](#) applies, [Wis. Stat. §§ 48.32\(1\)\(b\)1.b., 938.32\(1\)\(c\)1.b.](#); *see also supra* [§ 8.7](#) (describing circumstances of [Wis. Stat. §§ 48.355\(2d\)\(b\)1.-5.](#) and [938.355\(2d\)\(b\)1.-4.](#));
3. If a permanency plan has previously been prepared for the child, a finding as to whether the responsible department or agency has made reasonable efforts to achieve the permanency goal of the child's permanency plan, including, if appropriate, through an out-of-state placement, [Wis. Stat. §§ 48.32\(1\)\(b\)1.c., 938.32\(1\)\(c\)1.c.](#);
4. If the child's placement or other living arrangement is under the supervision of the county department (or, in a Children's Code proceeding in Milwaukee County, by the DCF), an order ordering the child into the placement and care responsibility of the county department (or the DCF) as required under [42 U.S.C. § 672\(a\)\(2\)](#) and assigning the county department (or the DCF) primary responsibility for providing services to the child, [Wis. Stat. §§ 48.32\(1\)\(b\)1.d., 938.32\(1\)\(c\)1.d.](#);
5. If the child has one or more siblings who have also been removed from the home, a finding as to whether the county department or responsible agency (or the DCF, in a Children's Code proceeding in Milwaukee County) made reasonable efforts to place the child in a placement that enables the sibling group to remain together, unless contrary to the safety or well-being of the child or any of those siblings, in which case the court must order the responsible department or agency to make reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and the siblings, unless the court determines that such visitation or interaction would be contrary to the safety or well-being of the child or any of those siblings, [Wis. Stat. §§ 48.32\(1\)\(b\)1.m., 938.32\(1\)\(c\)1.m.](#); and
6. If the child is placed in a residential care center for children and youth, group home, or shelter care facility certified as a qualified residential treatment program under [Wis. Stat. § 48.675](#), a finding as to whether (a) the child's needs can be met through placement in a foster home; (b) the child's placement in a residential care center for children and youth, group home, or shelter care facility certified as

a qualified residential treatment program under [Wis. Stat.](#) § 48.675 provides the most effective and appropriate level of care for the child in the least restrictive environment; (c) the placement is consistent with the child's short-term and long-term goals, as specified in the permanency plan; and (d) the court approves or disapproves the placement, [Wis. Stat.](#) §§ 48.32(1)(b)1r., 938.32(1)(c)1r.; *see also* [Wis. Stat.](#) §§ 48.32(1)(cd), 938.32(1)(cd) (discussing timing); and

7. If an Indian child is placed outside the home of his or her parent or Indian custodian when a consent decree is entered and if the consent decree maintains the Indian child in that placement or other living arrangement, or if an amended consent decree changes the placement of the Indian child from a placement in the Indian child's home to a placement outside the Indian child's home, a finding supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the Indian juvenile by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and a finding that active efforts have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful, [Wis. Stat.](#) §§ 48.32(1)(d)1., 938.32(1)(e)1.

If the court finds that any circumstance of [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or 938.355(2d)(b)1.–4. applies, the consent decree must include a determination that the department or agency is not required to make reasonable efforts to return the child to the parent's home. [Wis. Stat.](#) §§ 48.32(1)(b)2., 938.32(1)(c)2.

All these findings should be made on a case-by-case basis, and the consent decree must contain the specific information on which the court has based these findings. [Wis. Stat.](#) §§ 48.32(1)(b)3., 938.32(1)(c)3. A consent decree that fails to include the specific information on which the court has based its findings is insufficient. [Wis. Stat.](#) §§ 48.32(1)(b)3., 938.32(1)(c)3.

## 5. Permanency Hearing [§ 8.36]

If the court has found that any circumstance specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or 938.355(2d)(b)1.–4. applies, a hearing must be held under [Wis. Stat.](#) § 48.38(4m) or 938.38(4m) within 30 days after that finding to determine the “permanency goal and, if applicable, any concurrent permanency goals” for the child. [Wis. Stat.](#) §§ 48.32(1)(c), 938.32(1)(d).

## 6. Termination of Consent Decree [§ 8.37]

### a. Objection [§ 8.38]

The consent decree terminates whenever the child or expectant mother objects to its continuation. [Wis. Stat.](#) §§ 48.32(3), 938.32(3).

**Comment.** In CHIPS and UCHIPS cases, the child (if 12 years old or older), the child's parent, guardian, or legal custodian, the expectant mother (and her parent, guardian, or legal custodian if she is a child), the unborn child's guardian ad litem, and the petitioner must all agree to the consent decree. [Wis. Stat.](#) § 48.32(1)(a). But only the child (apparently regardless of age) or expectant mother has statutory authority to object to continuation of the consent decree. [Wis. Stat.](#) § 48.32(3). For example, a guardian ad litem could not object to continuation of a consent decree in a CHIPS case on behalf of the child whose best interests the guardian ad litem represents. Yet, given the voluntary nature of a consent decree, it seems anomalous for the statute to be inapplicable to CHIPS parents. Reading [Wis. Stat.](#) §§ 48.32(3) and 48.32(1)(a) together, a more reasonable interpretation of the statute would hold that a consent decree *could* be terminated on the objection of a CHIPS parent who is subject to the decree's terms and conditions. *See Pulaski State Bank v. Kalbe*, 122 Wis. 2d 663, 665, 364 N.W.2d 162 (Ct. App. 1985) (stating rule of construction that “[s]tatutes relating to the same subject matter must be construed together”). Moreover, it is the CHIPS parent's alleged behavior that is intended to be modified by the conditions imposed by the court. Therefore, if the CHIPS parent objects to continuation of the consent decree, and thus asserts a preference to have the matter brought back to court, it only seems right that the consent decree would be terminated.

### b. Compliance [§ 8.39]

A consent decree remains in effect up to 6 months in CHIPS and UCHIPS cases and 12 months in JIPS and delinquency cases unless the court sooner discharges the child, expectant mother, parent, guardian, or legal custodian. [Wis. Stat.](#) §§ 48.32(2)(a), 938.32(2)(a).

**Comment.** [Wis. Stat.](#) ch. 938 provides that a juvenile who is discharged by the court or who completes the period of supervision without reinstatement of the original petition cannot be proceeded against for the same offense or a different offense arising from the same conduct. The court must dismiss the petition with prejudice. [Wis. Stat.](#) § 938.32(4). [Wis. Stat.](#) ch. 48 does not have a similar provision. Theoretically, a CHIPS or UCHIPS petition could be reinstated or a new petition filed even if a parent or expectant mother has complied with the terms and conditions of a consent decree. Presumably, however, principles of res judicata (claim preclusion) and collateral



estoppel (issue preclusion) would prevent the county (or another county) from proceeding against the parents or expectant mother on the same grounds or for the same conduct. *Sheboygan Cnty. v. D.T. (In the Int. of L.A.T.)*, 167 Wis. 2d 276, 286 n.6, 481 N.W.2d 493 (Ct. App. 1992); see also *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 549–50, 525 N.W.2d 723 (1995) (adopting terms “claim preclusion” and “issue preclusion” in lieu of “res judicata” and “collateral estoppel”). In *D.T.*, however, the court of appeals held that Sheboygan County could proceed against a parent who had entered into a consent decree in Ozaukee County because the Sheboygan County allegations occurred during a different time frame.

### c. Noncompliance [§ 8.40]

#### (1) Extension of Consent Decree [§ 8.41]

The court can extend the consent decree for an additional six months. The court can take this step on its own motion or after application by the child, the parent, guardian, or legal custodian, the expectant mother, the unborn child’s guardian ad litem, the intake worker, or any agency supervising the child or expectant mother under the consent decree. [Wis. Stat.](#) §§ 48.32(2)(c), 938.32(2)(c). The parties to the consent decree and their counsel or guardian ad litem and CASA, if any, must receive notice of the intent to extend. [Wis. Stat.](#) §§ 48.32(2)(c), 938.32(2)(c). If the CHIPS child or the parent, guardian, or legal custodian, the expectant mother, or the unborn child’s guardian ad litem objects to the extension, the court must schedule a hearing and then determine whether to extend the consent decree. [Wis. Stat.](#) §§ 48.32(2)(c), 938.32(2)(c).

**Comment.** [Wis. Stat.](#) § 938.32(2)(c) provides that only the parent, guardian, or legal custodian has the right to a hearing on an extension under [Wis. Stat.](#) ch. 938. Two commentators have interpreted this exclusion to signify that the judge cannot extend a consent decree *at all* if the juvenile objects. Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 6.16 (2d ed. 1983). This interpretation accords with [Wis. Stat.](#) § 938.32(6), which requires the court to inform the juvenile and the juvenile’s parent, guardian, or legal custodian of *the juvenile’s* right to object to an extension and of reinstatement of the petition as the possible consequence of that objection.

Although the statutes do not specify the procedure a court should follow at a consent decree extension hearing, cases dealing with probation extension hearings offer guidance. In *Huggett v. State*, 83 Wis. 2d 790, 266 N.W.2d 403 (1978), the supreme court held that a defendant’s failure to make restitution within the original probationary period might constitute grounds for extension of probation, but only if some basis existed for believing that additional restitution would serve the objectives of probation and that the defendant had the ability to pay. *Id.* at 803. A good-faith effort to pay during the original probationary period militates against extension. *Id.*

The analogy to *Huggett* has limits because of the different contexts of the two extensions. A probation extension case involves a defendant already found guilty and sentenced; extension subjects a defendant to a longer term of probation, an inherently punitive outcome. Failure to comply with a consent decree results in reinstatement of proceedings; compliance results in dismissal with prejudice of the action altogether. Even so, the *Huggett* factors for probation extension hearings seem suited to consent decree extension hearings: whether the terms and conditions of the consent decree were reasonable, whether the child or parent made a good-faith effort to comply with them, and whether extension would further the goals of the consent decree.

#### (2) Reinstatement of Petition [§ 8.42]

If the court finds before expiration of the consent decree that the child, parent, guardian, legal custodian, or expectant mother has failed to fulfill the terms and conditions of the consent decree or that the child or expectant mother objects to the continuation of the consent decree, the hearing that led to the child’s or expectant mother’s placement under supervision can continue to conclusion, as if the consent decree had never been entered. [Wis. Stat.](#) §§ 48.32(3), 938.32(3). In *State v. Sarah R.P. (In the Interest of Sarah R.P.)*, 2001 WI App 49, 241 Wis. 2d 530, 624 N.W.2d 872, the court of appeals held that the circuit court loses competence to vacate a consent decree on the date the consent decree expires, even if there is a pending motion to vacate from the state.

[Wis. Stat.](#) §§ 48.32(3) and 938.32(3) require the court to make a finding as to the appropriateness of terminating the consent decree based on noncompliance and of reinstating proceedings. The requirement of a finding implies the need for a hearing. Although Wisconsin courts have not decided this issue, the Washington Supreme Court has held that the same due-process rights afforded defendants in parole and probation revocation proceedings—including the right to have the agreement administered equitably, “with full protection of the constitutional rights relinquished in the bargain”—apply to deferred prosecution agreements. *State v. Marino*, 674 P.2d 171, 174 (Wash. 1984). Therefore, due process requires that a defendant be granted a hearing for a judicial determination of whether the defendant has failed to comply with the agreement. The type of hearing required remains unknown, but cases dealing with the due-process rights of defendants who have entered into deferred prosecution agreements that the state later terminated for noncompliance offer guidance.

In *United States v. Allen*, 683 F. Supp. 1136 (E.D. Mich. 1988), the district court held that a defendant who fulfills the terms of a pretrial diversion agreement earns the right not to be prosecuted and that this right “may be in the nature of a due process right.” *Id.* at 1138. The court suggested that at a post-indictment hearing, once a defendant proves the existence of a diversion agreement, the government has the burden of proving that prosecution does not violate the agreement (i.e., that the defendant has not lived up to the defendant’s end of the bargain). *Id.*

At the least, the minimum due-process rights of *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972), should apply. See *State v. B.S. (In the Int. of B.S.)*, 162 Wis. 2d 378, 469 N.W.2d 860 (Ct. App. 1991) (holding *Morrissey* applicable to juvenile sanction cases). To the extent *B.S.* adopted *Morrissey* because both sanction cases and revocation proceedings involve criminal or quasi-criminal actions that have resulted in adjudications of guilt and dispositions (sentencings), perhaps the analogy does not apply. However, the court in *B.S.* emphasized that sanction cases differ significantly from criminal cases because juvenile sanction cases are not punitive in nature. The same distinction holds for consent decrees. Under the *Morrissey/B.S.* standard, due process requires that the child, expectant mother, or parent

1. Receive written notice of the conditions with which he or she has not complied;
2. Receive disclosure of the evidence against him or her;
3. Have an opportunity to be heard and to present witnesses and documentary evidence;
4. Have the right to confront and cross-examine adverse witnesses;
5. Have the issues heard by a neutral and detached hearing body; and
6. Receive a written statement by the fact-finder as to the evidence relied on and the reasons for reinstating proceedings.

*Id.* at 401.

At what stage the proceedings will resume depends, of course, on when the consent decree was entered. For example, if the parties entered into the consent decree after an admission or trial but before adjudication, then the proceedings would resume at the fact-finding stage.

## 7. Recusal of Judge [§ 8.43]

[Wis. Stat.](#) §§ 48.32(5) and 938.32(5) provide that a court cannot participate in subsequent proceedings if the court elicits information about a child or expectant mother that the court would rule inadmissible at trial, and either (1) the court subsequently reinstates the petition; or (2) the court rejects the consent decree and the parent, child, or expectant mother denies the allegations in the petition. Recusal is allowed only if a party objects to further participation by the court. [Wis. Stat.](#) §§ 48.32(5), 938.32(5).

**Comment.** Recusal seems especially appropriate if the court, rather than a jury, will do the fact-finding, as occurs in JIPS and delinquency cases. In this instance, counsel might want to object to continued participation by the court in such proceedings, although the rules governing admissibility of evidence tend to operate more flexibly when the court acts as the trier of fact.

## V. Admissions [§ 8.44]

[Wis. Stat.](#) §§ 48.30(8) and 938.30(8) require that, at the plea hearing, the court address the parties present (including the child or expectant mother) personally and determine that the plea or admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition or citation and of the potential dispositions.

Both [Wis. Stat.](#) §§ 48.30(8) and 938.30(8) correspond to [Wis. Stat.](#) § 971.08, which governs plea procedures in adult criminal cases and assists the court in “making the constitutionally required determination that a defendant’s plea is voluntary.” *State v. Bangert*, 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986). In delinquency cases, for the plea to meet the constitutional standard of voluntariness, the court must have evidence that the juvenile understands the nature of the charge and the possible dispositions. The colloquy must demonstrate that the admission is being entered knowingly, voluntarily, and intelligently. *Id.* at 260.

Under *Bangert*, ensuring that a juvenile understands the nature of the offenses to which the juvenile admits requires the court to inform the juvenile of the nature of the charge by doing one of the following:

1. Reading the applicable jury instruction;
2. Asking defense counsel to summarize how counsel explained the elements to the juvenile;
3. Expressly referring to the record or other evidence demonstrating the juvenile's understanding of the charge; or
4. Specifically referring to and summarizing any signed statement rendered by the juvenile.

*Id.* at 268.

**Comment.** In one unpublished decision, the court of appeals analogized [Wis. Stat. § 48.30\(8\)](#) to [Wis. Stat. § 971.08](#) and held that the record of the admission in that delinquency case did not demonstrate that the child understood the charges to which he sought to plead. *R.E.H. v. State (In the Int. of R.E.H.)*, No. 86-0373, 1986 WL 217266 (Wis. Ct. App. Sept. 12, 1986) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)). Consequently, because [Wis. Stat. § 48.30\(8\)](#) applies to CHIPS and UCHIPS cases, *Bangert* arguably applies to CHIPS and UCHIPS admissions as well. In addition, other compelling reasons point toward adopting the *Bangert* rule in CHIPS and UCHIPS cases. Although often characterized as civil cases, CHIPS and UCHIPS cases put more substantial interests at stake. Indeed, parents are entitled to effective assistance of counsel in CHIPS cases. *A.S. v. State (In the Int. of M.D.(S.))*, 168 Wis. 2d 995, 485 N.W.2d 52 (1992) (overruling *C.N. v. Waukesha Cnty. Cmty. Hum. Servs. Dep't (In the Int. of S.S.K.)*, 143 Wis. 2d 603, 422 N.W.2d 450 (Ct. App. 1988)). In addition, the statutes clearly require the court to determine that the parent or expectant mother understands “the nature of the acts alleged.” A court cannot adequately make this determination unless the court carefully ascertains whether the parent or expectant mother understands the elements of the grounds alleged in the CHIPS or UCHIPS petition.

But in *D.D. v. Fond du Lac County (In the Interest of K.L.Z.)*, No. 89-0307, 1989 WL 129426 (Wis. Ct. App. Aug. 2, 1989) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)), the court of appeals held that the criminal standards for withdrawal of a plea (including whether the plea is voluntary) do not apply to CHIPS cases because they are essentially civil cases. Instead, the court adopted for CHIPS cases the Wisconsin Supreme Court's rule for determining the voluntariness of an admission to a petition to terminate parental rights. To determine whether consent is voluntary and informed under that rule, a court must ascertain the following: (1) the extent of the parent's education and level of general comprehension; (2) the parent's understanding of the nature of the proceedings and the consequences of termination; (3) the parent's understanding of the role of the guardian ad litem and the parent's right to adversary counsel; (4) the extent and nature of the parent's communication with the guardian ad litem, the social worker, or any other adviser; (5) whether any promises or threats were made to the parent to induce the admission; and (6) whether the parent is aware of alternatives to termination of parental rights. *T.M.F. v. Children's Serv. Soc'y of Wis. (In the Int. of D.L.S.)*, 112 Wis. 2d 180, 196–97, 332 N.W.2d 293 (1983).

Many courts use an admission questionnaire and waiver-of-rights forms. A standard “Plea Questionnaire/Waiver of Rights/Delinquency” form (Form [JD-1737](#)) is available from the Wisconsin court system's website, at <https://www.wicourts.gov/forms1/circuit.htm>. Counsel can complete this form with the client. While the form does not eliminate the need for a personal colloquy between the court and the juvenile, the court can use the form as a reference. The appellate courts have approved the use of a plea questionnaire form in criminal cases, *State v. Hoppe*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794; *State v. Moederndorfer*, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987); see Form CR-227, as long as the record demonstrates that the defendant understands that the plea will result in waiver of applicable constitutional rights. *State v. Hansen*, 168 Wis. 2d 749, 755–56, 485 N.W.2d 74 (Ct. App. 1992).

In addition to finding that the plea is voluntary and informed, the court must do the following:

1. Establish whether any promises or threats were made to elicit the plea or admission and alert unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances that would not be apparent to them; and
2. Establish that there is a factual basis for the plea or admission of the parent, child, and expectant mother.

[Wis. Stat. §§ 48.30\(8\)\(b\), \(c\), 938.30\(8\)\(b\), \(c\)](#).

**Comment.** In *State v. Hansen*, the court of appeals held that the judge's determination that the defendant had gone over the guilty-plea questionnaire and waiver-of-rights form and understood the form did not suffice to show that the defendant understood that he would give up the rights detailed in the form. *Hansen*, 168 Wis. 2d at 756.

## VI. Pleas of Not Responsible by Reason of Mental Disease or Defect in Delinquency Case [§ 8.45]

As a matter of due process, a juvenile in a delinquency case can raise the defense of not responsible by reason of mental disease or defect. See *Winburn v. State*, 32 Wis. 2d 152, 145 N.W.2d 178 (1966).

[Wis. Stat.](#) § 938.30(5) sets forth the procedure when a juvenile enters a plea on this ground. The court must order an examination and must specify the deadline for filing a report. [Wis. Stat.](#) § 938.30(5)(a).

If the juvenile has admitted the allegations in the petition or entered a plea of no contest, the court must set a hearing to determine whether the juvenile was not responsible by reason of mental disease or defect. The court must hold the hearing within 10 days after the plea hearing for a juvenile held in secure custody and within 30 days for a juvenile not held in secure custody. [Wis. Stat.](#) § 938.30(5)(a)1.

If a juvenile denies the allegations in the petition and the court finds the juvenile guilty, the court must hold the plea hearing immediately after the fact-finding hearing. [Wis. Stat.](#) § 938.30(5)(a)2.

Unlike the defendant in a criminal case, a juvenile has no right to a jury trial on the issue of mental responsibility. *R.H.L. v. State (In the Int. of R.H.L.)*, 159 Wis. 2d 653, 464 N.W.2d 848 (Ct. App. 1990). In adult criminal cases, a five-sixths verdict is required. *State v. Koput*, 142 Wis. 2d 370, 397, 418 N.W.2d 804 (1988). Although the statutes do not specify the procedural requirements for the hearing, the defendant in a criminal case has the burden of proving the defendant's nonresponsibility "to a reasonable certainty by the greater weight of the credible evidence." [Wis. Stat.](#) § 971.15(3).

If the court finds the juvenile responsible, the court must proceed to a dispositional hearing. [Wis. Stat.](#) § 938.30(5)(b).

If the court finds the juvenile not responsible, the court must dismiss the petition with prejudice and can either order the county to seek the juvenile's commitment under [Wis. Stat.](#) § 51.20(1) or order the prosecutor to file a petition alleging that the juvenile is in need of protection or services under [Wis. Stat.](#) § 938.13(14). [Wis. Stat.](#) § 938.30(5)(c). [Wis. Stat.](#) § 51.20(1) governs involuntary mental commitments and requires that an individual be proved both mentally ill and dangerous. [Wis. Stat.](#) § 938.13(14) provides that a juvenile can be found in need of protection or services if the juvenile has been found not responsible for a delinquent act by reason of mental disease or defect, pursuant to [Wis. Stat.](#) § 938.30(5)(c).

## VII. Practice Form [§ 8.46]

The form in this section is offered as a practice guide. Always check original sources of authority for current law. When using the sample form, also check local practice and adapt the form language to fit the client's circumstances. Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System's website, at <https://www.wicourts.gov/forms1/circuit.htm>. A list of those standard court forms is included in [appendix B](#), *infra*.

**A. Request for Substitution of Judge (Form CRM-0190) [§ 8.47]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



## REQUEST FOR SUBSTITUTION OF JUDGE <sup>[1]</sup>

---

Pursuant to [Wis. Stat.](#) § 938.29, *(juvenile's name)*, by *(his) (her)* attorney, requests substitution of a new judge for Judge *(judge's name)*, the judge assigned to this case.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

## VIII. [Standard Juvenile Court Forms](#)



## [§ 8.48]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|--------------------------|---------------------------|--|---|
| <a href="#">IW-1720</a>  | Both                      | Summons—Indian Child Welfare Act   | Formal notice requiring a person to appear in court and respond to a citation or petition when the case involves a child or juvenile who is subject to ICWA   |
| <a href="#">IW-1724</a>  | Both                      | Notice of hearing (juvenile)—Indian Child Welfare Act                                | Notice informing interested persons of the scheduling of court proceedings in a case involving a child who is subject to ICWA   |
| <a href="#">IW-1785A</a> | Both                      | Stipulation for consent decree (out-of-home placement only)—Indian Child Welfare Act | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings involving a child or juvenile subject to ICWA  |
| <a href="#">IW-1785B</a> | Both                      | Consent decree (out-of-home placement only)—Indian Child Welfare Act                 | Finding of agreement and order for parties to comply with consent decree in case involving out-of-home placement for child or juvenile subject to ICWA; court official approves the consent decree and orders the parties to comply with it |
| <a href="#">JD-1716</a>  | Both                      | Notice of rights and obligations   | Notice to child and parent of basic rights and obligations and possibility of disclosure of personal information to victims   |
| <a href="#">JD-1720</a>  | Both                      | Summons  | Formal notice requiring a person to appear in court and to respond to a citation or petition  |
| <a href="#">JD-1724</a>  | Both                      | Notice of hearing (juvenile)   | Notice informing individuals involved in a case of a scheduled court proceeding   |
| <a href="#">JD-1729</a>  | Both                      | Petition to vacate consent decree and waiver of hearing                              | Petition to vacate a consent decree and waive rights to a hearing   |
| <a href="#">JD-1730</a>  | Both                      | Order on petition vacating consent decree and reinstating proceedings                | Order for termination of a consent decree and reinstatement of the proceedings  |
| <a href="#">JD-1759</a>  | Ch. 938                   | Petition for judgment against juvenile/parent for unpaid restitution                 | Request by victim, insurer, or representative of the public interest to have a restitution order converted into a money judgment that can be docketed against the juvenile and parents  |
| <a href="#">JD-1760</a>  | Ch. 938                   | Petition for judgment against juvenile/parent for unpaid forfeiture                  | Request by state, county, or municipality to have an unpaid forfeiture converted into a money judgment that can be docketed against the juvenile and parents  |

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose   |
|--------------------------|---------------------------|---|---|
| <a href="#">JD-1761</a>  | Ch. 938                   | Judgment for unpaid restitution/ forfeiture                 | Court order granting a judgment against juvenile or parent with custody for unpaid restitution, forfeiture, or both   |
| <a href="#">JD-1784A</a> | Both                      | Stipulation for consent decree (in-home placement only)     | Agreement between parties requiring certain actions or activities to be done in exchange for suspending formal proceedings  |
| <a href="#">JD-1784B</a> | Both                      | Consent decree (in-home placement only)                     | Court findings and order to record an agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings; court official approves the consent decree and orders the parties to comply with it |
| <a href="#">JD-1785A</a> | Both                      | Stipulation for consent decree (out-of-home placement only) | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings  |
| <a href="#">JD-1785B</a> | Both                      | Consent decree (out-of-home placement only)                 | Court findings and order to record an agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings; court official approves the consent decree and orders the parties to comply with it |

## Supplement Chapter 9

### Discovery and Other Motion Practice

Book sections supplemented: [9.1](#), [9.7](#), and [9.47](#)

Book section replaced (blue pages): [9.34](#)

Book sections replaced (white pages): [9.65](#) and [9.66](#)

#### 9.1 Scope of Chapter

[Page 2: Updated currency information in footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272.

#### 9.7 [Discovery] [Rules Applicable to CHIPS, UCHIPS, Delinquency, JIPS, and TPR Proceedings] Relevant Records

[Page 5: Replaced second paragraph in section](#)

A party can obtain copies of the records with the permission of the records custodian or the court. [Wis. Stat.](#) §§ 48.293(2), 938.293(2). The Wisconsin Court of Appeals has stated that the Wisconsin Constitution grants an alleged victim standing to oppose motions for release of the victim's records in a criminal or juvenile case, *State v. Johnson*, [2020 WI App 73](#), [394 Wis. 2d 807](#), [951 N.W.2d 616](#) (citing Wis. Const. art. 1, § 9m(2)(i), (4)(a)), but the Wisconsin Supreme Court reversed that decision on other grounds and declined to address "arguments about whether our constitution or victims' rights statutes grant crime victims standing in the context of a criminal case." *State v. Johnson*, [2023 WI 39](#), ¶ 47 n.21, [407 Wis. 2d 195](#), [990 N.W.2d 174](#).

[Page 6: Added paragraph before last Comment in section](#)

However, a defendant's constitutional right to access court records does not extend to privately held, privileged medical records of a complaining witness. *State v. Johnson*, [2023 WI 39](#), [407 Wis. 2d 195](#), [990 N.W.2d 174](#). In *Johnson*, the Wisconsin Supreme Court overruled *State v. Shiffra*, [175 Wis. 2d 600](#), [499 N.W.2d 719](#) (Ct. App. 1993), which had previously established a defendant's constitutional right to in camera inspection of medical records of a complaining witness if the defendant could make a preliminary showing that the sought-after evidence was material to the defense. In overruling *Shiffra*, the *Johnson* court agreed with the state's argument that *Shiffra* was wrongly decided—stating that *Shiffra* (1) was based on the misinterpretation of the U.S. Supreme Court decision in *Pennsylvania v. Ritchie*, [480 U.S. 39](#) (1987), resulting in *Ritchie*'s extension to privileged (not merely confidential) records not in the state's possession and thereby harming the therapist-patient relationship; (2) was unworkable in practice because assessing whether sought-after evidence was material to a defense was inherently speculative and could not be applied consistently; and (3) had been undermined by new developments in the law regarding sexual assault and domestic violence and by the adoption of new statutory and constitutional provisions protecting the rights of complaining witnesses, therefore making *Shiffra* "detrimental to coherence in the law." *Johnson*, [2023 WI 39](#), ¶ 23, [407 Wis. 2d 195](#). However, in overruling *Shiffra*, the court also made clear that nothing in its opinion should be read as questioning *Ritchie*, which established an in camera procedure for accessing confidential records in the government's possession after a showing of materiality by the defense.

### 9.34 [Discovery] [Rules Applicable Specifically in Delinquency Proceedings] [Discovery and Inspection of Evidence] In Camera Proceedings

[Page 11: Replaced section](#)

Either party may move for an in camera inspection by the court of any document required to be disclosed under [Wis. Stat.](#) § 971.23(1) or (2m) for the purpose of masking or deleting any irrelevant material. [Wis. Stat.](#) § 971.23(6m). This does not extend to privately held, privileged medical records of a complaining witness. *State v. Johnson*, [2023 WI 39](#), [407 Wis. 2d 195](#), [990 N.W.2d 174](#) (overruling *State v. Shiffra*, [175 Wis. 2d 600](#), [499 N.W.2d 719](#) (Ct. App. 1993)). See Supplement section 9.7 for more explanation.

### 9.47 [Pretrial Motion Practice] [Suppression Motions in Delinquency Cases] Confessions

[Pages 17–18: Replaced last four paragraphs in section](#)

In *Miranda* [*v. Arizona*, [384 U.S. 436](#) (1966)], the Court described "custody" as when a suspect has been "deprived of his freedom of action in any significant way." Custody means "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."

In making that determination, courts will look to the totality of the circumstances, including "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. ... The test "is an objective one," that is, "whether a reasonable person in the suspect's position would have considered himself or herself to be in custody."

*State v. Quigley*, 2016 WI App 53, ¶¶ 32–33, [370 Wis. 2d 702](#), [883 N.W.2d 139](#) (citations omitted). "Stated another way, if 'a reasonable person would not feel free to terminate the interview and leave the scene,' then that person is in custody for *Miranda* purposes." *State v. Lonkoski*, [2013 WI 30](#), ¶ 27, [346 Wis. 2d 523](#), [828 N.W.2d 552](#).

When *Miranda* rights are read before a custodial interview, the court must look to the facts surrounding the interrogation to determine two things: whether the defendant's waiver of *Miranda* rights was voluntary, and whether the statements made were voluntary. *Miranda*, 384 U.S. at 444, 462. The state cannot use any statements by a defendant, whether exculpatory or inculpatory, unless there are safeguards in place to protect the privilege against self-incrimination. *Id.* at 444.

It is the state's burden to show that (1) *Miranda* warnings were given, (2) the defendant understood the defendant's rights, and (3) statements were not coerced. *Berghuis v. Thompkins*, [560 U.S. 370](#), 384 (2010). Waiver does not need to be explicit; an implicit waiver

can suffice. *Id.* However, a valid waiver is not presumed merely from a defendant’s silence or only from the fact that a confession was eventually obtained. *Miranda*, 384 U.S. at 475.

The Wisconsin Supreme Court has explained its method of analyzing voluntariness:

In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police. The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative on ... whether the inculpatory statement was the product of “a free and unconstrained will, reflecting deliberateness of choice.”

*State v. Clappes*, [136 Wis. 2d 222](#), 235–36, [401 N.W.2d 759](#) (1987) (citations omitted). The conduct of police can be coercive without being egregious. *State v. Hoppe*, [2003 WI 43](#), ¶ 46, [261 Wis. 2d 294](#), [661 N.W.2d 407](#). A person can be highly susceptible to police pressures because of the person’s physical and mental condition. Consequently, pressures may be coercive under one set of circumstances but not under another set. *Id.*

Courts look at the “totality of the circumstances” when assessing voluntariness. This includes personal characteristics that may render a defendant particularly vulnerable to coercion, such as age, mental condition, level of education, and literacy. See *In re Gault*, [387 U.S. 1](#), 45 (1967); *Haley v. Ohio*, [332 U.S. 596](#) (1948). But see *Colorado v. Connelly*, [479 U.S. 157](#) (1986) (reversing suppression of mentally ill defendant’s confession).

**Practice Tip.** In drafting a motion to suppress, defense counsel can sometimes best demonstrate the “totality of the circumstances” for the defendant by means of psychological assessments. A psychologist can assess a juvenile-defendant’s individualized education program (IEP) and conduct IQ testing. A psychologist can also administer the *Miranda* Rights Comprehension Instruments, which can assess the juvenile-defendant’s understanding of their own *Miranda* rights. And a psychologist can administer the Gudjonsson Suggestibility Scales, which assess how suggestible or easily persuaded the juvenile-defendant was during the testing. Such assessments can bring the “totality of the circumstances” to life for the court, as the defense presents how—in light of a juvenile-defendant’s age, mental condition, level of education, and literacy—the interaction with police, even if it might not have been egregious in other circumstances, nevertheless could have been coercive and procured an involuntary statement that necessitates suppression in a specific case.

## Chapter 9

# Discovery and Other Motion Practice

### I. [Scope of Chapter](#)

#### [§ 9.1]

This chapter discusses the procedure for bringing pretrial motions in proceedings for delinquency and termination of parental rights (TPR), as well as in proceedings involving juveniles in need of protection and services (JIPS proceedings), children in need of protection and services (CHIPS proceedings), and unborn children in need of protection or services (UCHIPS proceedings). In these proceedings, [Wis. Stat.](#) §§ 48.297 and 938.297 govern motions before trial, and [Wis. Stat.](#) §§ 48.293 and 938.293 govern discovery. This chapter also discusses the rules governing discovery in criminal cases because, under [Wis. Stat.](#) § 938.293(2), those rules generally apply in delinquency cases.<sup>1</sup>

Finally, the chapter discusses some issues that commonly arise in these proceedings in the context of discovery and other pretrial motions.

**Note.** This chapter does not examine discovery procedures available under the private guardianship statute, [Wis. Stat.](#) § 48.9795.

### II. Procedure [§ 9.2]

[Wis. Stat.](#) § 48.297 governs the procedure for bringing motions before trial in CHIPS, UCHIPS, and TPR proceedings. [Wis. Stat.](#) § 938.297 governs the procedure for bringing motions in JIPS and delinquency proceedings. Much of the language in these statutes tracks

[Wis. Stat.](#) § 971.31, which governs pretrial motions in criminal cases.

Under both [Wis. Stat.](#) ch. 48 (the Wisconsin Children’s Code) and [Wis. Stat.](#) ch. 938 (the Wisconsin Juvenile Justice Code), any motion capable of determination without trial of the general issue can be made before trial, unless statutory provisions governing specific types of motions specify other time periods. [Wis. Stat.](#) §§ 48.297(1), 938.297(1); *see* [Wis. Stat.](#) § 971.31(1). *See generally* *infra* § 9.42 (time periods for bringing motions).

### III. Discovery [§ 9.3]

#### A. Rules Applicable to CHIPS, UCHIPS, Delinquency, JIPS, and TPR Proceedings [§ 9.4]

##### 1. Police Reports [§ 9.5]

In proceedings under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, upon request, the prosecutor must provide copies of all reports of law enforcement officers (including but not limited to the officers’ memoranda and witnesses’ statements) to adversary counsel, or the guardian ad litem for any party or court-appointed special advocate (CASA) for the child, if any, before the plea hearing. [Wis. Stat.](#) §§ 48.293(1), 938.293(1). *But see* *infra* § 9.35 (discussing limited discovery in delinquency cases in which a waiver petition under [Wis. Stat.](#) § 938.18 has been filed). In delinquency cases, JIPS cases based on a delinquent act, and civil law and ordinance violations, only the juvenile (through adversary counsel or the guardian ad litem) can properly gain access to the reports. [Wis. Stat.](#) § 938.293(1); *see also* *infra* §§ 9.53–.54 (motion and order for delivery of law enforcement officers’ reports). *See* [chapter 15](#) (confidentiality), *infra*, for a discussion of other persons’ ability to inspect law enforcement records under [Wis. Stat.](#) § 938.396. Both parents (including expectant mothers) and the child have a right to access in CHIPS, UCHIPS, and TPR cases. [Wis. Stat.](#) § 48.293(1).

##### 2. Confidential Informers [§ 9.6]

In proceedings under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, the identity of a confidential informer can be withheld in accordance with [Wis. Stat.](#) § 905.10, which creates a rule of privilege to refuse to disclose the identity of an informer. *See* [Wis. Stat.](#) §§ 48.293(1), 938.293(1). An appropriate representative of the state or other subdivision can claim the privilege if the information was furnished to one of its officers. [Wis. Stat.](#) § 905.10(2). Usually, the police officer who received the information claims the privilege.

The rule rests on the premise that informers function as an “important aspect of law enforcement and that the anonymity of informers is necessary for their effective use.” *State v. Outlaw*, 108 Wis. 2d 112, 121, 321 N.W.2d 145 (1982). The privilege does not provide an absolute shield, however, and [Wis. Stat.](#) § 905.10(3) contains exceptions, including an exception in criminal cases if the informer’s testimony is “necessary to a fair determination of the issue of guilt or innocence” and in civil cases if the testimony bears significantly on “a material issue on the merits.” [Wis. Stat.](#) § 905.10(3)(b).

In criminal cases, then, the court must deal with confidentiality claims by balancing the public interest in promoting effective law enforcement against a defendant’s confrontation rights and right to present a defense. *Roviaro v. United States*, 353 U.S. 53, 59–61 (1957). As discussed in [chapter 2](#), *supra*, the Due Process Clause of the 14th Amendment guarantees a juvenile the right to confront and cross-examine adverse witnesses in both delinquency and waiver proceedings, including the postadjudicative stage. U.S. Const. amend. XIV; *Schall v. Martin*, 467 U.S. 253, 263 (1984); *In re Gault*, 387 U.S. 1, 56 (1967); *Kent v. United States*, 383 U.S. 541, 563 (1966). Parents, too, have a due-process right to confront and cross-examine witnesses. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (TPR proceedings); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (dependency proceedings), *distinguished on other grounds* by *Blake v. Jossart*, 2016 WI 57, 370 Wis. 2d 1, 884 N.W.2d 484. A fundamental element of due process consists of the “effective opportunity to defend by confronting any adverse witnesses,” even when the interest at stake is the loss of welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970). In addition, both the Children’s Code and the Juvenile Justice Code provide the statutory right to confront and cross-examine witnesses at various stages of the proceedings, including at waiver proceedings under [Wis. Stat.](#) § 938.18(3)(b), delinquency and JIPS proceedings under [Wis. Stat.](#) § 938.243(1)(d), CHIPS and UCHIPS proceedings under [Wis. Stat.](#) § 48.243(1)(d), and change-of-placement hearings under [Wis. Stat.](#) § 938.357(3). The right to present a defense is a fundamental aspect of due process. *Gault*, 387 U.S. at 36; *Kent*, 383 U.S. at 563. This is reflected in both codes, which provide the right to present and subpoena witnesses in CHIPS, UCHIPS, JIPS, and delinquency proceedings, the right to compulsory process for any person whose presence is necessary, and the right to present evidence at various stages of the proceedings.

A defendant seeking disclosure of a confidential informer’s identity must show a reasonable possibility, grounded in the facts and circumstances of the case, that the informer might have information necessary to a fair determination of guilt or innocence, i.e., necessary to the defendant’s theory of defense. *State v. Nellesen*, 2014 WI 84, ¶¶ 2, 25, 360 Wis. 2d 493, 849 N.W.2d 654. The burden then shifts to the



state to prove that the informer's testimony is not relevant to the defense. *State v. Vanmanivong*, 2003 WI 41, ¶ 32, 261 Wis. 2d 202, 661 N.W.2d 76 (citing *Outlaw*, 108 Wis. 2d at 141–42 (Callow, J., concurring)).

In delinquency proceedings, testimony necessary to ensure a fair adjudication for the juvenile would meet the standard of “necessary to a fair determination of guilt or innocence.” See *Outlaw*, 108 Wis. 2d at 128. An informer's testimony might qualify as necessary even if the informer did not witness the transaction underlying the alleged delinquent act. See *State v. Hargrove*, 159 Wis. 2d 69, 76 n.1, 469 N.W.2d 181 (Ct. App. 1990).

The state can meet its burden by presenting affidavits or in camera testimony demonstrating what the informer's testimony will be. *Outlaw*, 108 Wis. 2d at 127. The court must then determine the relevancy, admissibility, and necessity of the testimony. *Id.* at 139 (Callow, J., concurring); see *State v. Dowe*, 120 Wis. 2d 192, 194–95, 352 N.W.2d 660 (1984) (explaining that the concurring opinions in *Outlaw* represent the majority on the issue of what test should apply); see also *Vanmanivong*, 2003 WI 41, ¶ 24, 261 Wis. 2d 202 (reaffirming *Dowe*).

The court does not assess the credibility of the testimony, a determination that would go to the weight rather than the admissibility of the evidence. *Outlaw*, 108 Wis. 2d at 126–27. For example, in *Outlaw*, the supreme court held that the circuit court erroneously exercised its discretion by excluding the testimony of the informer because the ruling rested, in part, on the court's speculation about the effect of the informer's testimony on the jury (i.e., on his credibility). *Id.* at 138.

The same procedure applies in civil cases—CHIPS, UCHIPS, JIPS, and TPR proceedings—except that the party seeking disclosure of the informer's identity must demonstrate that the informer's testimony might be necessary to a fair determination of a material issue in the case. *Wis. Stat.* § 905.10(3)(b).

If the government persists in asserting the privilege even after the judge has determined that there is a “reasonable probability that the informer can give the testimony,” the judge must, upon motion by defense counsel in criminal cases (i.e., delinquency proceedings), dismiss the charges to which the testimony relates. *Id.* In civil cases (i.e., CHIPS, UCHIPS, JIPS, and TPR proceedings), the judge “may make an order that justice requires.” *Id.*

**Comment.** As noted above, in criminal cases, the court must balance the public interest in effective law enforcement against the defendant's right to present a defense through confrontation of people who are witnesses against the defendant. Although the right of confrontation under the 6th Amendment does not apply in CHIPS or UCHIPS cases, parents and expectant mothers have a due-process right of confrontation under the 14th Amendment. U.S. Const. amends. VI, XIV. See also generally *supra* [ch. 2](#). Arguably then, the criminal standard applies in CHIPS and UCHIPS cases, and, therefore, so does the remedy for nondisclosure (dismissal of those grounds to which the testimony relates). On the other hand, the prosecutor might contend that differences between criminal cases and CHIPS and UCHIPS cases weigh in favor of the civil standard of “necessary to a fair determination of a material issue in the case,” a standard that the prosecutor might find easier to meet than the criminal standard.

When information from a confidential informer serves to establish the legality of obtaining evidence (e.g., probable cause for a search warrant), the judge can require disclosure of the informer's identity to determine the reliability or credibility of the informer. *Wis. Stat.* § 905.10(3)(c); see *State v. Gordon*, 159 Wis. 2d 335, 349, 464 N.W.2d 91 (Ct. App. 1990).

### 3. [Relevant Records](#)

#### [§ 9.7]

Upon demand, all records relating to a child, or to an unborn child and the unborn child's expectant mother, that are “relevant to the subject matter of a proceeding” under the Children's Code or Juvenile Justice Code must be open to inspection by the guardian ad litem or counsel for any party or by the CASA for the child, if any, at least 48 hours before the proceeding. *Wis. Stat.* §§ 48.293(2), 938.293(2). *Wis. Stat.* § 48.293(2) requires presentation of releases “when necessary” (i.e., when required by statute). Cf. *Wis. Stat.* § 938.293(2) (requiring presentation of releases “where necessary”).

A party can obtain copies of the records with the permission of the records custodian or the court. *Wis. Stat.* §§ 48.293(2), 938.293(2). The Wisconsin Constitution grants an alleged victim standing to oppose motions for release of the victim's records in a criminal or juvenile case. *State v. Johnson*, 2020 WI App 73, [394 Wis. 2d 807](#), 951 N.W.2d 616 (citing Wis. Const. art. 1, § 9m(2)(i), (4)(a)) (review granted).

The court has authority to order counsel not to disclose specific items in the records to the child, parent, or expectant mother, if the court “reasonably believes that the disclosure would be harmful to the interests of the child or the unborn child.” *Wis. Stat.* § 48.293(2); see also

[Wis. Stat.](#) § 938.293(2). Such an order may have an effect, however, on the ability of defense counsel to confer with the client to determine the accuracy of information to adequately prepare a defense.

**Comment.** Some circuit courts take the position that, as a matter of policy in every case, adversary counsel cannot show court reports to their clients. Under [Wis. Stat.](#) §§ 48.293(2) and 938.293(2), however, such a restriction can operate only if the court “reasonably believes,” based on the facts of the case, that disclosure would prove harmful to the child or unborn child. Even if the court makes such a finding in an individual case, the court order might still violate due process. *See, e.g., State v. Skaff*, [152 Wis. 2d 48](#), 447 N.W.2d 84 (Ct. App. 1989), *distinguished by State v. Loomis*, 2016 WI 68, [371 Wis. 2d 235](#), 881 N.W.2d 749. In *Skaff*, the court of appeals held that although a circuit court can withhold the identity of informers named in a presentence report, a defendant’s due-process right to sentencing on the basis of correct information is violated when a circuit court denies the defendant access to the presentence report. To the extent that a court report in proceedings under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938 corresponds to a presentence report in a criminal case, counsel might use *Skaff* to argue in favor of disclosure on due-process grounds.

Counsel should also note that, in *Loomis*, the Wisconsin Supreme Court held that a defendant’s due-process rights are not violated by the withholding of proprietary information pertaining to risk assessments, such as COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), if there are other independent factors to support a sentencing decision. So, under *Loomis*, if a prosecution uses other factors *and* an assessment tool, the defendant does not have a right to access the propriety process used to determine the scores generated by the assessment tool.

In delinquency and JIPS cases, defense counsel has access to any court records related to the client. [Wis. Stat.](#) § 938.396(2g)(dm). For further discussion of a person’s right to inspect juvenile court records, see [chapter 15](#) (confidentiality), *infra*. Defense counsel must request the court records and use the records only for the purpose of preparing a defense for the client. [Wis. Stat.](#) § 938.396(2g)(dm).

**Comment.** The statute authorizes defense counsel to inspect any court records related to the client for the purpose of preparing a defense for alleged delinquent or *criminal* activity. Therefore, an attorney representing an *adult* client has a right to that client’s juvenile court records.

## B. Rules Applicable Specifically in Delinquency Proceedings [§ 9.8]

### 1. Nature of the Right to Discovery [§ 9.9]

Certain discovery rules apply specifically in delinquency proceedings. That is, [Wis. Stat.](#) ch. 938 makes [Wis. Stat.](#) § 971.23—the rules governing discovery in criminal cases—applicable to delinquency cases as well. [Wis. Stat.](#) § 938.293(2).

No general constitutional right to discovery exists in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). However, due process requires that the prosecution disclose to the defendant, upon request, evidence favorable to the defendant if the evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, due process forbids enforcement of alibi rules unless criminal defendants enjoy reciprocal discovery rights. *Wardius v. Oregon*, 412 U.S. 470, 472 (1973); *see* [Wis. Stat.](#) § 971.23(8). These same rights exist in delinquency proceedings.

### 2. Discovery and Inspection of Evidence [§ 9.10]

#### a. In General [§ 9.11]

[Wis. Stat.](#) § 971.23, which is based on Fed. R. Crim. P. 16, was the first Wisconsin statute to provide pretrial discovery to both the state and the defendant. *Cheney v. State*, 44 Wis. 2d 454, 464–65, 171 N.W.2d 339 (1969) (quoting the comment to [Wis. Stat.](#) § 971.23(3) and (6) of the then proposed bill, which ultimately created [Wis. Stat.](#) § 971.23); *see also* Ch. 255, Laws of 1969 (eff. July 1, 1970). The Wisconsin Legislature enacted the pretrial discovery statute to make the criminal justice system more efficient, to improve the performance of counsel, *Cheney*, 44 Wis. 2d at 465, and to ensure that the focus of trial remains on ascertaining the truth rather than on winning by ambush. *See generally* 5 Wayne R. LaFave et al., *Criminal Procedure* ch. 20 (4th ed. 2015). [Wis. Stat.](#) § 971.23 should be understood to serve these same purposes in delinquency proceedings.

#### b. What the State Is Required to Disclose [§ 9.12]

##### (1) In General [§ 9.13]



In general, the prosecutor has a duty to preserve and, upon demand, disclose evidence in the possession of state investigative agencies. *Wold v. State*, 57 Wis. 2d 344, 349, 204 N.W.2d 482 (1973). The prosecutor's duty to preserve and disclose evidence extends only to that evidence that the state intends to introduce at trial. *State v. Disch*, 119 Wis. 2d 461, 478, 351 N.W.2d 492 (1984). [Wis. Stat.](#) § 971.23(1) requires the prosecutor, upon demand and within a reasonable time before trial, to disclose and permit the defendant or defense counsel to inspect and copy or photograph all the materials and information described in sections [9.14–9.21](#), *infra*, if those materials are within the possession, custody, or control of the state. [Wis. Stat.](#) § 938.293(2) specifies that the court must establish the timetable for disclosures required under [Wis. Stat.](#) § 971.23(1). The test of whether the prosecutor should disclose evidence turns not on whether the prosecutor knows of the existence of the evidence but on whether the prosecutor *should* have known of its existence through the exercise of due diligence. *Wold*, 57 Wis. 2d at 350.

## **(2) Juvenile's Statements [§ 9.14]**

The state must allow defense counsel to inspect and copy or photograph any written or recorded statement of the juvenile concerning the alleged crime (including statements made during John Doe hearings or before a grand jury) and the names of witnesses to the juvenile's written statements if the state has the statement in its possession, custody, or control. [Wis. Stat.](#) § 971.23(1)(a). Statements are not limited to those resulting from police interrogations and investigation. *Kutchera v. State*, 69 Wis. 2d 534, 544, 230 N.W.2d 750 (1975).

The prosecutor must also allow defense counsel to inspect and copy or photograph a written summary of the juvenile's oral statements that the prosecutor intends to use at trial and the names of any witnesses to those oral statements. [Wis. Stat.](#) § 971.23(1)(b).

## **(3) Prior Juvenile Record [§ 9.15]**

The prosecutor must furnish the juvenile with a copy of his or her juvenile record in the possession, custody, or control of the state. [Wis. Stat.](#) § 971.23(1)(c)

## **(4) Physical Evidence [§ 9.16]**

The prosecutor must disclose to the juvenile any physical evidence that the prosecutor intends to offer in evidence at trial. [Wis. Stat.](#) § 971.23(1)(g). The juvenile is allowed to inspect and copy or photograph that physical evidence. [Wis. Stat.](#) § 971.23(1).

## **(5) Intercepted Communications [§ 9.17]**

The prosecutor must disclose to the juvenile any wire, electronic, or oral communications, if the prosecutor intends to use the evidence at trial. [Wis. Stat.](#) § 971.23(1)(bm); *see* [Wis. Stat.](#) § 968.31(2)(b).

## **(6) Witness List [§ 9.18]**

The prosecutor must disclose to the juvenile a list of the witnesses the prosecutor intends to call at trial and their addresses. [Wis. Stat.](#) § 971.23(1)(d). See also section [9.29](#), *infra*, for a discussion of the witness list to be provided to the juvenile when the juvenile has given a notice of alibi. The prosecutor need not disclose rebuttal witnesses or those called only for impeachment purposes, however. [Wis. Stat.](#) § 971.23(1)(d).

## **(7) Witness Statements [§ 9.19]**

The prosecutor must disclose to the juvenile any relevant written or recorded statements of a witness the prosecutor intends to call at trial. [Wis. Stat.](#) § 971.23(1)(e). This also includes any audiovisual recordings of oral statements of a child. *See* [Wis. Stat.](#) § 908.08. The prosecutor must also disclose any expert's report or statement or, if the expert did not prepare a report, a written summary of the expert's findings or the subject matter of the expert's testimony. [Wis. Stat.](#) § 971.23(1)(e). Finally, the prosecutor must disclose the results of any physical or mental examination, scientific test, experiment, or comparison that the prosecutor intends to offer in evidence at trial. *Id.*

## **(8) Criminal Record of Witnesses [§ 9.20]**

On demand, the prosecutor must disclose to the juvenile alleged to be delinquent the criminal record (if known) of any prosecution witness. [Wis. Stat.](#) § 971.23(1)(f).

**Comment.** Presumably, the prosecutor must also disclose to the alleged delinquent juvenile the *juvenile* record of any prosecution witness, with defense counsel having a corresponding obligation as to defense witnesses. This result seems appropriate given the language in [Wis. Stat.](#) § 906.09, which allows for impeachment of a witness's character for truthfulness with the witness's prior delinquency adjudications. References to impeachment by evidence of delinquency adjudications were added to [Wis. Stat.](#) § 906.09 by 1995 Wis. Act 77, the act that created the Juvenile Justice Code, which took effect on July 1, 1996. Although 1995 Wis. Act 77 did not also amend [Wis. Stat.](#) § 971.23, a requirement for the prosecutor to disclose any juvenile record along with any criminal record would avoid disharmony in applying the two statutes; indeed, the prosecutor's failure or refusal to disclose a juvenile record would effectively nullify the amendment to [Wis. Stat.](#) § 906.09. (The legislature originally created the language now found in [Wis. Stat.](#) § 971.23(1)(f) as part of a Criminal Code revision in 1969. *See* Ch. 255, Laws of 1969 (eff. July 1, 1970); *see also* 1995 Wis. Act 387 (eff. Jan. 1, 1997) (renumbering and amending [Wis. Stat.](#) § 971.25(1) as [Wis. Stat.](#) § 971.23(1)(f)).)

## (9) Exculpatory Evidence [§ 9.21]

The prosecutor must disclose to the juvenile any exculpatory evidence. [Wis. Stat.](#) § 971.23(1)(h). 1995 Wis. Act 387, by creating [Wis. Stat.](#) § 971.23(1)(h), codified the requirement established in case law (*see, e.g., Brady v. Maryland*, 373 U.S. 83 (1963)) that a prosecutor must disclose and allow inspection and copying of any evidence that is favorable to the defendant.

## (10) DNA Evidence [§ 9.22]

[Wis. Stat.](#) § 971.23(9) contains provisions relating to the time in which the state, in criminal cases, must (1) notify opposing counsel of the state's intent to use DNA profile evidence at trial to prove or disprove the identity of a person, and (2) provide the defense with witness statements and test results relating to the evidence. In delinquency cases, however, the juvenile court sets the timetable for the disclosures required under [Wis. Stat.](#) § 971.23(9). [Wis. Stat.](#) § 938.293(2).

### c. What the Juvenile Is Required to Disclose [§ 9.23]

#### (1) In General [§ 9.24]

[Wis. Stat.](#) § 971.23(2m) establishes defense counsel's obligation to provide a witness list, witness statements, criminal records of witnesses, and physical evidence to the prosecution within a reasonable time before trial if those materials are within the possession, custody, or control of the defendant. [Wis. Stat.](#) § 938.293(2) specifies that the court must establish the timetable for disclosures required under [Wis. Stat.](#) § 971.23(2m).

*State v. McClaren*, 2009 WI 69, 318 Wis. 2d 739, 767 N.W.2d 550, expanded the court's control of defense disclosures by authorizing pretrial judicial examination of evidence not offered under [Wis. Stat.](#) § 971.23(2m). In *McClaren*, defense counsel sought to offer evidence of the victim's prior violent acts (i.e., *McMorris* evidence, *see McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973)) in support of the defendant's self-defense claim and argued that the defense had no obligation to disclose the information to either the state or the court before trial. But the court in *McClaren* held that [Wis. Stat.](#) §§ 906.11 and 901.04(3)(d) authorize the court to exercise control over the presentation of evidence so that the truth can be effectively ascertained; time will not be needlessly wasted; the jury will be presented with admissible, reliable evidence; and the court can make pretrial rulings so that the trial runs smoothly. *McClaren*, 2009 WI 69, ¶¶ 3, 47, 318 Wis. 2d 739. The court's authority also applies to the prosecution's rebuttal evidence.

#### (2) Witness Lists [§ 9.25]

The juvenile must disclose to the prosecutor a list of the witnesses, other than the juvenile, whom the juvenile intends to call at trial, along with their addresses. [Wis. Stat.](#) § 971.23(2m)(a). The juvenile need not, however, disclose any rebuttal witnesses or witnesses who will be called for impeachment purposes. *Id.*

[Wis. Stat.](#) § 971.23 contains provisions relating to the time in which a defendant must furnish witness lists to opposing counsel in criminal cases. *See* [Wis. Stat.](#) § 971.23(2m) (requiring disclosure of defendant's witness list "within a reasonable time before trial"), (8)(a) (requiring disclosure of witnesses to alibi "at least 30 days before trial"). In delinquency cases, however, the juvenile court sets the timetable for the disclosure of the witness lists required under [Wis. Stat.](#) § 971.23(2m) and (8). [Wis. Stat.](#) § 971.23(2m).

#### (3) Witness Statements [§ 9.26]

The juvenile must disclose to the prosecutor any relevant written or recorded statements of a witness whom the juvenile intends to call at trial. [Wis. Stat. § 971.23\(2m\)\(am\)](#). The juvenile must also disclose any expert's report or statement or, if the expert did not prepare a report, a written summary of the expert's findings or the subject matter of the expert's testimony. [Wis. Stat. § 971.23\(2m\)\(am\)](#). Finally, the juvenile must disclose the results of any physical or mental examination, scientific test, experiment, or comparison that the juvenile intends to offer in evidence at trial. *Id.*

#### **(4) Criminal Record of Witnesses [§ 9.27]**

The juvenile must disclose to the prosecutor the criminal record (if known) of any defense witness, other than the juvenile. [Wis. Stat. § 971.23\(2m\)\(b\)](#).

#### **(5) Physical Evidence [§ 9.28]**

The juvenile must disclose to the prosecutor any physical evidence that the juvenile intends to offer in evidence at trial. [Wis. Stat. § 971.23\(2m\)\(c\)](#). The prosecutor is allowed to inspect and copy or photograph such physical evidence. [Wis. Stat. § 971.23\(2m\)](#).

#### **(6) Notice of Alibi [§ 9.29]**

If the juvenile intends to rely on an alibi defense, the juvenile must give a notice of alibi. In the notice, the juvenile must inform the state of the place where the juvenile claims to have been at the time of the alleged offense and must provide the names and addresses of witnesses in support of the alibi. [Wis. Stat. § 971.23\(8\)\(a\)](#). Under [Wis. Stat. § 938.293\(2\)](#), the juvenile court sets the time for providing the notice of alibi. A defense that focuses on "the defendant's activities at the time of a specific act which is in itself a violation of a criminal statute" triggers the notice-of-alibi statute. [State v. Horenberger](#), 119 Wis. 2d 237, 243, 349 N.W.2d 692 (1984). Thus, in *Horenberger*, the supreme court held that testimony that the defense attempted to introduce concerning the defendant's location during the planning stages of the crimes did not constitute an alibi defense. *Id.*

Failure to submit a notice of alibi can result in exclusion of the evidence. [Wis. Stat. § 971.23\(8\)\(b\)](#). For cause, the court can allow the evidence and then order other relief, such as granting the state a continuance to investigate the alibi.

The U.S. Supreme Court has held that the Due Process Clause of the 14th Amendment precludes enforcement of a statute requiring a defendant to give a notice of alibi unless the defendant has reciprocal discovery rights. U.S. Const. amend. XIV; [Wardius v. Oregon](#), 412 U.S. 470 (1973). [Wis. Stat. § 971.23\(8\)\(d\)](#) requires the state to provide the defense with the names and addresses of any witnesses the state intends to call to rebut or discredit the defendant's alibi. [Wis. Stat. § 971.23\(8\)\(d\)](#). Although the statute requires the state to respond within 20 days from receipt of the notice of alibi, [Wis. Stat. § 938.293\(2\)](#) provides that the juvenile court sets the timetable for delinquency cases. Failure by the district attorney to respond requires exclusion of the rebuttal evidence unless the court, for cause, orders another remedy, such as a continuance. [Wis. Stat. § 971.23\(8\)\(d\)](#); [State v. Hoffman](#), 106 Wis. 2d 185, 222, 316 N.W.2d 143 (Ct. App. 1982).

**Comment.** Defense counsel can sometimes challenge the exclusion of a defense witness based on violation of a procedural rule, such as the notice-of-alibi statute. Counsel could challenge the exclusion as a denial of the 6th Amendment right to a fair trial (or, in delinquency cases, as a denial of due process under U.S. Const. amends. V and XIV). [Smith v. Kolb](#), 950 F.2d 437, 440 (7th Cir. 1991). The defense must demonstrate that the excluded evidence was "relevant, material, and vital to the defense," and the court must balance the juvenile's right to a fair trial against the state's interest in the witness preclusion rule. *Id.* (quoting [Lange v. Young](#), 869 F.2d 1008, 1011 (7th Cir. 1989)). Factors relevant to this determination include the effectiveness of less restrictive sanctions, the materiality of the evidence, the prejudice to the state, and any evidence of bad faith. *Id.*

#### **(7) DNA Evidence [§ 9.30]**

[Wis. Stat. § 971.23\(9\)](#) contains provisions relating to the time in which the defendant or defense counsel, in criminal cases, must (1) notify the state of the defendant's intent to use DNA profile evidence at trial to prove or disprove the identity of a person, and (2) provide the state with witness statements and test results relating to the evidence. In delinquency cases, however, the juvenile court sets the timetable for the disclosures required under [Wis. Stat. § 971.23\(9\)](#). [Wis. Stat. § 938.293\(2\)](#).

#### **d. Scientific Testing [§ 9.31]**

On motion of either the prosecutor or the juvenile, the court can order scientific testing of physical evidence under terms and conditions prescribed by the court. [Wis. Stat. § 971.23\(5\)](#).

### e. Continuing Duty [§ 9.32]

If a party discovers additional material or the names of additional witnesses subject to discovery, the party must promptly notify the other party. [Wis. Stat.](#) § 971.23(7). Failure to do so will result in exclusion of the evidence, unless the party shows good cause for failure to comply. [Wis. Stat.](#) § 971.23(7m)(a). The court can, in appropriate cases, grant the opposing party a recess or continuance. *Id.* In addition, the court can advise the jury of any failure or refusal to disclose material or information that is required to be disclosed under [Wis. Stat.](#) § 971.23(1) or (2m), as well as any untimely disclosure of material or information required to be disclosed under those provisions. [Wis. Stat.](#) § 971.23(7m)(b). Lack of adequate preparation by counsel does not constitute good cause. [Wold v. State](#), 57 Wis. 2d 344, 350–51, 204 N.W.2d 482 (1973).

### f. Protective Orders [§ 9.33]

Upon motion of a party, the court can at any time deny, restrict, or defer discovery. [Wis. Stat.](#) § 971.23(6). The burden of establishing the need for a protective order rests on the party seeking the order. *See State v. Bowser*, 2009 WI App 114, ¶ 10, 321 Wis. 2d 221, 772 N.W.2d 666. The juvenile or the juvenile’s attorney cannot compel a victim of a crime to submit to a pretrial interview or deposition, except as provided in [Wis. Stat.](#) § 967.04 (depositions in criminal proceedings). [Wis. Stat.](#) § 971.23(6c).

### g. In Camera Proceedings [§ 9.34]

Either party may move for an in camera inspection by the court of any document required to be disclosed under [Wis. Stat.](#) § 971.23(1) or (2m) for the purpose of masking or deleting any irrelevant material. [Wis. Stat.](#) § 971.23(6m).

## 3. Juvenile Waiver [§ 9.35]

Case law limits discovery in juvenile waiver cases. [Wis. Stat.](#) § 938.18; *see also infra* [ch. 14](#) (waiver into adult court). Therefore, the rule that a juvenile must have access before the plea hearing to information contained in police reports does not apply in delinquency cases in which a petition seeking waiver of juvenile court jurisdiction has been filed. This is so unless the juvenile can make a showing of a particularized need for inspection, such as a specific showing of the unreliability of the information on which the state relied to prove prosecutive merit. *T.M.J. v. State (In the Int. of T.M.J.)*, 110 Wis. 2d 7, 327 N.W.2d 198 (Ct. App. 1982).

Although the juvenile does not have a right to discovery of materials concerning the offense itself, the juvenile has a right to disclosure of information in the state’s control relating to the juvenile’s personality and history, as well as other information relevant to a determination of whether to waive jurisdiction. *Id.* at 14.

## C. Rules Applicable Specifically in CHIPS, UCHIPS, and TPR Proceedings [§ 9.36]

### 1. Role of the Rules of Civil Procedure [§ 9.37]

[Wis. Stat.](#) ch. 48 specifically allows for civil discovery procedures to apply in CHIPS, UCHIPS, and TPR cases. That is, [Wis. Stat.](#) § 48.293(4) states that in addition to the discovery procedures permitted under [Wis. Stat.](#) § 48.293, “the discovery procedures permitted under [\[Wis. Stat.\]](#) ch. 804 shall apply in all proceedings under this chapter.”

[Wis. Stat.](#) ch. 804 allows for discovery by one or more of the following methods: depositions, interrogatories, production of documents or things, physical and mental examinations, and requests for admission. See [Wis. Stat.](#) §§ 804.01–.12 for the specific procedures governing civil discovery.

Discovery is very broad. Generally, any party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” [Wis. Stat.](#) § 804.01(2). Information and materials do not need to be admissible in evidence to be discoverable, but the requested materials must be relevant. *Id.*

**Note.** The Wisconsin Legislature has limited the availability of discovery in civil actions filed on or after July 1, 2018, reducing the generally permissible quantity of interrogatories and depositions, for example. *See generally* 2017 Wis. Act 235. In appropriate cases, however, courts may issue an order under [Wis. Stat.](#) § 804.01(2) to allow for broader discovery.

## 1. Privileges and Other Protections [§ 9.38]

Privileged materials, such as those covered by the attorney-client privilege, the work-product doctrine, and the Fifth Amendment privilege against self-incrimination, are generally not discoverable in CHIPS, UCHIPS, and TPR proceedings.

The attorney-client privilege applies to all communications between the attorney and the client and is absolute unless a [Wis. Stat. § 905.03\(4\)](#) exception applies or the privilege is waived. The work-product doctrine is qualified by [Wis. Stat. § 804.01\(2\)\(c\)](#) and applies to “documents prepared in anticipation of litigation” regardless of whether the litigation had commenced at the time of their preparation or whether the litigation is the proceeding in which the protection is asserted. *Dilger v. Metropolitan Prop. & Cas. Ins. Co.*, 2015 WI App 54, ¶ 21, [364 Wis. 2d 410](#), 868 N.W.2d 177 (holding that circuit court erred when it found that work-product and attorney-client-privilege protections did not apply either because they were asserted after liability issues were determined or because communications occurred before case commenced).

A party seeking information that has been classified as work product must “make an adequate showing that the information contained in the work-product is unavailable from other sources and that a denial of discovery would prejudice the movant’s preparation for trial.” *State ex rel. Dudek v. Circuit Ct. for Milwaukee Cnty.*, [34 Wis. 2d 559](#), 591, 150 N.W.2d 387 (1967).

Upon motion of a party, the court must limit the frequency or extent of discovery if it determines that one of the following applies:

1. The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.
2. The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties’ resources, the complexity and importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

[Wis. Stat. § 804.01\(2\)\(am\)](#).

## 2. Discovery and the Right Against Self-incrimination [§ 9.39]

Parents and expectant mothers have a limited statutory right against self-incrimination in CHIPS and UCHIPS cases: parents and expectant mothers have the right to remain silent, but their silence might be used against them. [Wis. Stat. § 48.243\(1\)\(c\)](#). If a parent or expectant mother chooses to exercise his or her right against self-incrimination, the prosecutor can comment to the jury about the exercise of this right, and the court can instruct the jury that it can consider the parent’s or expectant mother’s silence in rendering its decision. Likewise, in nondelinquency JIPS cases, parents and juveniles 10 years old or older have the right to remain silent, but their silence can be used against them. [Wis. Stat. § 938.243\(1\)\(c\)](#). In contrast, in criminal and delinquency cases, the prosecutor cannot comment on a defendant’s (or a juvenile’s) exercise of the constitutional right to remain silent. *Doyle v. Ohio*, [426 U.S. 610](#) (1976); *State v. Fencil*, [109 Wis. 2d 224](#), 233–34, 325 N.W.2d 703 (1982).

Parties may assert the Fifth Amendment right against self-incrimination as a bar to answering a question only when the answer “would subject an individual to criminal jeopardy.” *B&B Invs. v. Mirro Corp.*, [147 Wis. 675](#), 687, 434 N.W.2d 104 (Ct. App. 1988). If the non-asserting party challenges the invocation and if a circuit court finds that the privilege is meritless, the asserting party can be subject to sanctions. See [Wis. Stat. § 804.12](#).

The Wisconsin Rules of Civil Procedure can apply to certain proceedings under [Wis. Stat. ch. 48](#). In *N.Q. v. Milwaukee County Department of Social Services (In the Interest of F.Q.)*, [162 Wis. 2d 607](#), 611–12, 470 N.W.2d 1 (1991), the court held that CHIPS proceedings can be governed by the Wisconsin Rules of Civil Procedure, unless [Wis. Stat. ch. 48](#) prescribes a different procedure. In that case, the court held that a motion for summary judgment was permissible in a CHIPS case. The court explained that “the Code of Civil Procedure govern[s] practice in the circuit courts in this state, whether deemed a civil action or special proceeding, and whether cognizable as cases at law, equity, or of statutory origin, except when a different procedure is prescribed by statute or rule.” *Id.* at 612. “Because no section in the Children’s Code provides a procedure different from [[Wis. Stat. § 802.08](#)] for summary judgment,” the court concluded that “it is therefore available in CHIPS cases.” *Id.* The court did not discuss whether this procedure is available in delinquency or nondelinquency juvenile court proceedings.

**Note.** The court of appeals reached a different conclusion in a non-juvenile case involving involuntary commitment under [Wis. Stat. ch. 51](#). *Shirley J.C. v. Walworth Cnty. (In re Mental Condition of Shirley J.C.)*, [172 Wis. 2d 371](#), 493 N.W.2d 382 (Ct. App. 1992). In *Shirley*



*J.C.*, the court considered whether the county’s motion for summary judgment violated the subject individual’s due-process rights. The court held that motions for summary judgment in involuntary commitment proceedings under [Wis. Stat.](#) ch. 51 are not appropriate if the individual is competent and disputes the need for treatment. *Id.* at 381. The court explicitly distinguished *Shirley J.C.* from *N.Q.*, reasoning that, unlike mental commitment proceedings, CHIPS proceedings do not deprive anyone of liberty. *Id.* at 379–80.

For juvenile delinquency proceedings under [Wis. Stat.](#) ch. 938, traditional discovery practices such as request for interrogatories or requests for admission would likely not be available to the state because those procedures would violate the juvenile’s right to remain silent, as protected by both statute and the Constitution. See *In re Gault*, [387 U.S. 1](#) (1967); [Wis. Stat.](#) § 938.243(1)(c).

Nondelinquency JIPS cases are a different matter. Juveniles in nondelinquency JIPS proceedings are similarly situated to parties in CHIPS and TPR proceedings because juveniles in nondelinquency JIPS cases have a qualified right to remain silent. In other words, silence of any party (including the juvenile) might be relevant in the proceeding. [Wis. Stat.](#) § 938.243(1)(c). Additionally, the standard of proof for a petition in a nondelinquency JIPS proceeding is clear and convincing evidence. [Wis. Stat.](#) § 938.243(1)(h). So there is an argument that because of these characteristics, any party in a nondelinquency JIPS proceeding might use traditional discovery practices as used in TPR and CHIPS cases. But counsel should be aware that these discovery requests might incriminate a juvenile client and advise accordingly.

**Comment.** Regardless of whether juveniles are in a delinquency proceeding or a nondelinquency JIPS proceeding, their liberty is at stake because they are potentially subject to detention. Although the law is not completely developed in this area, *Shirley J.C.* may be instructive about whether certain practices, such as summary-judgment motions, are appropriate in delinquency and nondelinquency proceedings because of issues of individual liberty.

In a CHIPS, UCHIPS, or TPR case, if a party from whom discovery is sought believes the request for discovery imposes an undue burden or expense, or presents an annoyance, embarrassment, or oppression, the party can move for a protective order, and, for good cause shown, the court can make a number of rulings, including limiting the discovery, allocating the expenses between the parties, and ruling that the discovery need not be had. See [Wis. Stat.](#) § 804.01(3).

## IV. Pretrial Motion Practice [§ 9.40]

### A. In General [§ 9.41]

Previous chapters have discussed motions challenging the petition and requesting a substitution of judge. See *supra* [chs. 7, 8](#). This portion of the chapter summarizes the procedure for bringing pretrial motions in delinquency, JIPS, CHIPS, UCHIPS, and TPR cases, and discusses the most common types of pretrial motions.

### B. Time Periods for Bringing Motions [§ 9.42]

A party can file almost any motion at any time before trial. [Wis. Stat.](#) §§ 48.297(1), 938.297(1). Defense counsel, however, must raise any defense or objection based on defects in the institution of the proceedings (such as illegal arrests in delinquency cases) within 10 days after the plea hearing; if defense counsel does not do so, the defense or objection is waived. [Wis. Stat.](#) §§ 48.297(2), 938.297(2). The 10-day rule also applies to challenges based on lack of probable cause in the petition and to challenges based on the alleged invalidity of the statute on which the petition rests. [Wis. Stat.](#) §§ 48.297(2), 938.297(2). If a statute on which the circuit court’s power to act rests is alleged to be void for vagueness, a question of subject-matter jurisdiction arises. *State v. F.R.W. (In the Int. of F.R.W.)*, 61 Wis. 2d 193, 212 N.W.2d 130 (1973). Neither the parties nor the court can waive the issue, even if the issue arises for the first time on appeal. *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 538, 280 N.W.2d 316 (Ct. App. 1979).

Counsel must bring suppression motions in advance of the fact-finding hearing, although the court can hear the motion at the fact-finding hearing if an attempt to introduce the evidence surprises a “party” and that party “waives jeopardy.” [Wis. Stat.](#) §§ 48.297(3), 938.297(3). In delinquency cases, JIPS cases based on a delinquent act, and cases involving violations of a civil law or ordinance under [Wis. Stat.](#) § 938.125, only the juvenile can waive jeopardy. [Wis. Stat.](#) § 938.297(3).

**Comment.** [Wis. Stat.](#) § 48.297(3) is confusing. The statute allows the court to consider suppression motions at the fact-finding hearing in CHIPS, UCHIPS, and TPR cases if the attempt to introduce such evidence surprises a party and that party waives jeopardy. Neither suppression nor jeopardy applies, however, in CHIPS, UCHIPS, and TPR cases. Cf. [Wis. Stat.](#) § 48.317 (merely identifying the point at which jeopardy attaches, not creating statutory right). This confusion might have resulted from an oversight when the legislature drafted the legislation amending [Wis. Stat.](#) ch. 48 and creating [Wis. Stat.](#) ch. 938. See generally 1995 Wis. Act 77.

Under [Wis. Stat.](#) § 48.297(3), the legislature has given parents the right to raise suppression issues protecting Fourth Amendment interests. What is not clear, however, is the roadmap for conducting these hearings, because both [Wis. Stat.](#) ch. 48 and the Wisconsin Rules of Civil Procedure are silent as to how the evidentiary hearing should be conducted given that suppression issues are litigated in delinquency proceedings and adult criminal courts.

### C. Challenges to Requests for Psychological Evaluations [§ 9.43]

[Wis. Stat.](#) §§ 48.295 and 938.295 provide that for any child coming within the court's jurisdiction, the court can order an outpatient examination of the child to determine the child's physical, psychological, mental, or developmental condition or alcohol or other drug dependency. [Wis. Stat.](#) §§ 48.295(1), 938.295(1)(a). The court can order such an examination only after the filing of a petition and only if reasonable cause exists to warrant an examination or assessment. [Wis. Stat.](#) §§ 48.295(1), 938.295(1)(a). The court can also authorize the examination or assessment of a parent, guardian, or legal custodian whose ability to care for a child is at issue before the court or of an expectant mother whose ability to control her use of alcohol, controlled substances, or controlled substance analogs is at issue before the court. [Wis. Stat.](#) §§ 48.295(1), 938.295(1)(a).

Defense counsel can challenge a request for a psychological evaluation by arguing that reasonable grounds do not exist for the examination or assessment. Some attorneys have successfully argued that, because the county must pay for such an evaluation, see [Wis. Stat.](#) §§ 48.295(1), 938.295(1)(c), the court would waste taxpayers' money if it ordered an evaluation on the basis of allegations that have not yet been proved and that might not be proved at the fact-finding stage. The 1979 version of [Wis. Stat.](#) § 48.295(1) provided that the child's physical, psychological, mental, or developmental condition "may be considered in the disposition of the case." In chapter 300, section 42, of the Laws of 1979, the legislature eliminated the quoted portion of the statute, thus allowing for testimony concerning an evaluation, *if relevant*, at the fact-finding stage as well as at disposition.

See also [Wis. Stat.](#) § 971.23(5c), which provides that, in prosecutions for offenses that involve underlying conduct that was sexually motivated, "the court may not order any witness or victim, as a condition of allowing testimony, to submit to a psychiatric or psychological examination to assess his or her credibility."

### D. Suppression Motions in Delinquency Cases [§ 9.44]

#### 1. In General [§ 9.45]

As a general rule, defense counsel should approach suppression motions in delinquency cases in the same way that counsel litigates suppression motions in criminal cases. The legislature has created [Wis. Stat.](#) § 938.297(8) to permit appeal of rulings on motions to suppress statements and other evidence after entry of admissions (to the allegations in a petition under [Wis. Stat.](#) ch. 938) or no-contest pleas. The Juvenile Justice Code tracks the language of [Wis. Stat.](#) § 971.31(10), which applies to criminal prosecutions and allows defendants to appeal such rulings after entry of a plea of guilty or no contest. See 2009 Wis. Act 27.

For a thorough discussion of litigating suppression motions in delinquency cases, see generally Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* (2014).

#### 2. Illegal Arrest [§ 9.46]

Taking a juvenile into custody functions as an arrest for the purpose of litigating suppression motions. [Wis. Stat.](#) §§ 938.297(4), 938.19(3). An arrest might be challenged if the arrest was not based on the criteria for taking a juvenile into custody under [Wis. Stat.](#) §§ 938.19, 938.205, 938.208, and 938.209. See *supra* [ch. 5](#) (physical custody). For example, the court of appeals ruled unlawful the arrest of a child for a curfew ordinance violation not punishable by a forfeiture because the arrest did not meet the criteria of former [Wis. Stat.](#) § 48.19(1)(d)8. (now [Wis. Stat.](#) § 938.19(1)(d)8.), which allowed a child to be taken into custody if reasonable grounds existed for believing that the child has violated a local ordinance punishable by a forfeiture. *State v. J.F.F. (In the Int. of J.F.F.)*, 164 Wis. 2d 10, 473 N.W.2d 546 (Ct. App. 1991).

The standards governing probable cause to arrest an adult apply to determining the lawfulness of taking a child into custody. *State v. Woods*, 117 Wis. 2d 701, 710, 345 N.W.2d 457 (1984). Reasonable grounds and probable cause are synonymous: "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *Id.* (quoting *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977)).



Defense counsel should note that the remedy for an illegal arrest is *not* dismissal of the action but suppression of the evidence obtained as a result of the arrest. *State v. Smith*, 131 Wis. 2d 220, 388 N.W.2d 601 (1986). Suppression of evidence also serves as a possible remedy when a person has been arrested without a warrant and has not been brought before a neutral magistrate for a judicial determination of probable cause within 48 hours after the person's arrest. See *State v. Koch*, 175 Wis. 2d 684, 499 N.W.2d 152 (1993).

**Note.** The Wisconsin Supreme Court modified *Smith* in *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775. *Smith* was decided before the U.S. Supreme Court's holding in *New York v. Harris*, 495 U.S. 14 (1990), and relied on an earlier line of cases. In *Felix*, the court adopted the *Harris* rule:

[W]here police had probable cause before the unlawful entry and arrest, an arrest in violation of *Payton v. New York*, 445 U.S. 573 (1980),] does not require the suppression of evidence obtained from the defendant outside of the home, such as statements obtained after *Miranda* warnings and the waiver of those rights.

*Felix*, 2012 WI 36, ¶ 41, 339 Wis. 2d 670.

### 3. Confessions

#### [§ 9.47]

Statements obtained from a juvenile during a custodial interrogation generally are not admissible unless an audio recording or audio and visual recording of the interrogation was made under Wis. Stat. § 938.195(2) and is available. Wis. Stat. § 938.31(3)(b); *State v. Jerrell C.J. (In the Int. of Jerrell C.J.)*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110. The statement is still admissible without the requisite recording, however, if any of the following applies:

1. The juvenile refused to respond or cooperate with a recorded interrogation, so long as a law enforcement officer or agent made a contemporaneous recording or written record of the juvenile's refusal.
2. The statement was in response to a question asked as part of the routine processing after the juvenile was taken into custody.
3. The law enforcement officer or agent conducting the interrogation in good faith failed to make a recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or the equipment malfunctioned or stopped operating without the officer's or agent's knowledge.
4. The statement was made spontaneously and not in response to a question by a law enforcement officer or agent.
5. Exigent public safety circumstances existed that prevented the recording or rendered the making of a recording infeasible.
6. Other good cause exists for not suppressing the juvenile's statement.

Wis. Stat. § 938.31(3)(c).

A juvenile's lack of consent to the recording does not affect the admissibility of the recorded statement. Wis. Stat. § 938.31(3)(d).

To use statements obtained from a juvenile during a custodial interrogation, the state must advise the child of the rights to remain silent and to have an attorney present during the interrogation. *Fare v. Michael C.*, 442 U.S. 707, 717 (1979); *Dassey v. Dittmann*, 877 F.3d 297, 315 (7th Cir. 2017) (en banc) (holding that, although Dassey's below-average IQ and absence of previous experience with the criminal justice system were arguably distinguishable from facts in *Michael C.*, they were not enough to render Dassey's confession involuntary); see also *Miranda v. Arizona*, 384 U.S. 436v (1966). A juvenile's right to counsel attaches under the Due Process Clause of the 14th Amendment when the juvenile is taken into custody or upon the filing of the delinquency petition, whichever occurs first. U.S. Const. amend. XIV. For further discussion of a juvenile's rights in delinquency cases, including the right to counsel, see chapter 2 (rights of children and parents), *supra*. If the state interrogates the juvenile without an attorney present and obtains a statement, the state bears the burden of proving that the juvenile knowingly and voluntarily waived the right to remain silent and to have the assistance of counsel. *Fare*, 442 U.S. at 724–25.

The “totality of the circumstances” test applicable to interrogations in criminal cases also applies in delinquency cases. *Id.* at 725. Relevant factors include the juvenile's age, experience, education, background, and intelligence and whether the juvenile has the capacity to understand the warnings, the nature of the juvenile Fifth Amendment rights, and the consequences of waiving those rights. *Id.*; see also U.S. Const. amend. V.

Even if counsel was legitimately not present, the state must prove the voluntariness of any statement taken (i.e., that the statement was not coerced and “not the product of ignorance of rights or of adolescent fantasy, fright or despair”). *In re Gault*, 387 U.S. 1, 55 (1967). The court must determine the voluntariness of a confession within a totality of the circumstances framework. *Woods v. Clusen*, 794 F.2d 293, 297 (7th Cir. 1986). For an analysis of the voluntariness of a statement, see *Jerrell C.J.*, 2005 WI 105, ¶¶ 17–36, 283 Wis. 2d 145.

The court in *Jerrell C.J.* declined to abandon the totality of the circumstances approach in favor of a per se rule, under which the court would need to exclude custodial statements that a juvenile had given without the opportunity for consultation with a parent or interested adult. Instead, the court reaffirmed the warning in *Theriault v. State*, 66 Wis. 2d 33, 48, 223 N.W.2d 850 (1974), that the failure “to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel” will be considered “strong evidence that coercive tactics were used to elicit the incriminating statements.” In *Jerrell C.J.*, the court reminded law enforcement officials that Wisconsin law requires an “immediate attempt” to notify the parent when a juvenile is taken into custody. *Jerrell C.J.*, 2005 WI 105, ¶ 43, 283 Wis. 2d 145 (citing *Wis. Stat.* § 938.19(2)).

#### 4. Searches [§ 9.48]

**Caution.** The area of law involving Fourth Amendment interests in juvenile cases is not completely developed. Therefore, defense counsel should be aware that illegal searches might be conducted by any governmental employee (e.g., social workers), not only by law enforcement officers. Additionally, defense counsel should argue that the state bears the burden to prove that a search was legal, just as in criminal cases, because the state has presumably used evidence from that search in its prosecution. Defense counsel should be wary if the court grants an evidentiary hearing, because the state might call the parent, expectant parent, or child as a witness unless it can be shown that their testimony would be completely irrelevant.

The Due Process Clause of the 14th Amendment prevents a state from using evidence obtained as a result of searches that violate the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961); see U.S. Const. amend. XIV. Fourth Amendment protections apply to juveniles, and the exclusionary rule applies to delinquency cases. *L.L. v. Circuit Ct. (In the Int. of L.L.)*, 90 Wis. 2d 585, 592, 280 N.W.2d 343 (Ct. App. 1979); see U.S. Const. amend. IV.

The Fourth Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). But see *Isiah B. v. State (In the Interest of Isiah B.)*, 176 Wis. 2d 639, 649, 500 N.W.2d 637 (1993), in which the Wisconsin Supreme Court held that students have no reasonable expectation of privacy in their lockers (thus, no Fourth Amendment protection) if (1) the school has a written policy “retaining ownership and possessory control” of the lockers and (2) students of the school receive notice of that policy. The court noted that students of schools that do not have such a policy might have a lowered reasonable expectation of privacy in their lockers.

The standard for judging the legality of a school search is not probable cause but is whether, under the totality of the circumstances, the search was reasonable. *T.L.O.*, 469 U.S. at 341. The test for reasonableness considers two factors: whether the action was justified at its inception, and whether the search was “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The U.S. Supreme Court noted that the term “reasonable grounds” used by the New Jersey Supreme Court was “not substantially different” from the reasonableness standard. *Id.* at 343. In Wisconsin, however, “reasonable grounds” is synonymous with probable cause, at least as used in Juvenile Justice Code provisions governing the criteria for taking children into custody.

In *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009), the U.S. Supreme Court held that a strip search of a student by school officials was unreasonable because the search was not reasonably related in scope to the circumstances that justified the interference with the student’s privacy interest.

In *T.L.O.*, 469 U.S. at 342 n.7, the Supreme Court left open the question of the standard to apply if school officials conduct the search in conjunction with, or on behalf of, the police. The Wisconsin Supreme Court, however, has noted that the reasonable-grounds standard is inapplicable to searches conducted by police officers acting independently of school officials. *State v. Angelia D.B. (In the Int. of Angelia D.B.)*, 211 Wis. 2d 140, 564 N.W.2d 682 (1997). In those circumstances, probable cause might provide the appropriate standard. See *State v. Griffin*, 126 Wis. 2d 183, 194, 376 N.W.2d 62 (Ct. App. 1985), *aff’d*, 131 Wis. 2d 41, 388 N.W.2d 535 (1986), *aff’d sub nom. Griffin v. Wisconsin*, 483 U.S. 868 (1987), in which the state court of appeals noted in dicta that although the police can accompany a parole officer in the search of a parolee’s house based on reasonable suspicion, a parole officer cannot act as a “stalking horse” for the police (quoting *Latta v. Fitzharris*, 521 F.2d 246, 247 (9th Cir. 1975)). The reasonable-grounds standard applies when “the school has brought the police into the school-student relationship.” *Angelia D.B.*, 211 Wis. 2d at 155.

A minor can consent to the entry and search of a home. In determining whether a child has actual authority to consent, the court should consider the age of the child and the scope of the consent. [\*State v. Tomlinson\*, 2001 WI App 212, 247 Wis. 2d 682, 635 N.W.2d 201, \*aff'd\*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367.](#)

## E. Motions to Exclude Other Acts Evidence [§ 9.49]

A party can bring a motion in limine whenever the party seeks a pretrial ruling by the circuit court on a matter at issue, usually whether to admit or exclude evidence. A common motion in limine seeks the exclusion (or admission) of other acts or other wrongs evidence, also known as *Whitty* evidence. See [\*Whitty v. State\*, 34 Wis. 2d 278, 149 N.W.2d 557 \(1967\)](#); see also [Wis. Stat. § 904.04\(2\)](#).

The rules of evidence apply to fact-finding hearings in delinquency, CHIPS, UCHIPS, JIPS, and TPR cases. [Wis. Stat. §§ 48.299\(4\)\(a\), 938.299\(4\)\(a\)](#). Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” [Wis. Stat. § 904.01](#). Evidence that is not relevant is not admissible. [Wis. Stat. § 904.02](#). The court can exclude even relevant evidence if its prejudicial effect outweighs its probative value. [Wis. Stat. § 904.03](#).

Generally, the use of character evidence to show an individual’s propensity to act in a certain manner is inadmissible. [Wis. Stat. § 904.04\(1\)](#). In particular, the rules of evidence exclude evidence of other crimes, wrongs, or acts because juries that review such evidence tend to reach a particular verdict based on a party’s “bad character,” not because the prosecution has sustained its burden of proof. [\*Whitty\*, 34 Wis. 2d at 292.](#)

[Wis. Stat. § 904.04\(2\)\(a\)](#) provides a list of exceptions to the general rule of exclusion: “evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” [Wis. Stat. § 904.04\(2\)\(b\)1.](#) also provides that evidence of similar acts may be admissible without regard to whether the victim of the crime is the same as the victim of the similar act in criminal proceedings for any of the following: human trafficking, any offense against a child, a serious sex offense, domestic abuse, or any offense that is subject to a domestic abuse surcharge. In addition, under [Wis. Stat. § 904.04\(2\)\(b\)2.](#), in certain cases involving first-degree sexual assault under [Wis. Stat. § 940.225\(1\)](#) or first-degree sexual assault against a child under [Wis. Stat. § 948.02\(1\)](#), the court may allow the admission of evidence of past convictions of such offenses “as evidence of the person’s character in order to show that the person acted in conformity” with that character. Although the statutory list does not exhaust the possibilities for exceptions to exclusion, defense counsel should know the precise definitions for each of the exceptions and should prepare to argue that the evidence that the prosecution seeks to admit is not relevant to the case. See, e.g., [\*State v. Evers\*, 139 Wis. 2d 424, 440–41, 407 N.W.2d 256 \(1987\)](#) (knowledge); [\*State v. Fishnick\*, 127 Wis. 2d 247, 263, 378 N.W.2d 272 \(1985\)](#) (identity); [\*State v. Cartagena\*, 99 Wis. 2d 657, 667–71, 299 N.W.2d 872 \(1981\)](#) (motive and intent); [\*State v. Spraggin\*, 77 Wis. 2d 89, 99, 252 N.W.2d 94 \(1977\)](#) (plan); [\*State v. Johnson\*, 74 Wis. 2d 26, 42, 245 N.W.2d 687 \(1976\)](#) (absence of mistake or accident).

Evidence that fits one of the exceptions articulated in [Wis. Stat. § 904.04\(2\)](#) must still qualify as relevant to an issue in the case, and the probative value of the evidence must outweigh its prejudicial effect. [\*State v. Alsteen\*, 108 Wis. 2d 723, 729, 324 N.W.2d 426 \(1982\)](#). A useful resource on other acts evidence is Edward J. Imwinkelried, *Uncharged Misconduct Evidence* (2022).

For example, in delinquency cases based on drug charges, the prosecution might seek to admit evidence of weapons at the scene (or for a weapons-related charge, evidence of drugs at the scene) on the theory that “guns and drugs go together.” Unless, however, the evidence qualifies as relevant to a fact at issue in the case, and the prosecution can establish a connection between individuals who deal drugs and the possession of weapons, the evidence is not relevant. See [\*State v. Spraggin\*, 77 Wis. 2d 89, 99–100, 252 N.W.2d 94 \(1977\)](#) (concluding that evidence of weapons and stolen goods was not admissible in prosecution for delivery of heroin); cf. [\*State v. Wedgeworth\*, 100 Wis. 2d 514, 532, 302 N.W.2d 810 \(1981\)](#) (holding that evidence of weapons was admissible in prosecution for possession of drugs with intent to deliver, but only because defendant claimed that drugs were for personal use and there was expert testimony that drug dealers, not users, carry weapons).

Evidence of gang affiliation provides another example. Unless the prosecution can prove the juvenile’s gang affiliation and the relevance of that association to an issue in the case, the evidence is inadmissible. [\*United States v. Roark\*, 924 F.2d 1426, 1432–34 \(8th Cir. 1991\)](#) (holding evidence of defendant’s association with Hells Angels Motorcycle Club inadmissible); [\*United States v. Singleterry\*, 646 F.2d 1014, 1018 \(5th Cir. 1981\)](#) (reiterating rule that defendant’s guilt cannot be proved by evidence of association with “unsavory characters”); [\*United States v. Gosser\*, 339 F.2d 102, 112 \(6th Cir. 1964\)](#) (stating that defendant’s credibility cannot be attacked by evidence of association with convicted felons or gamblers). But see [\*United States v. Rodriguez\*, 925 F.2d 1049, 1053–54 \(7th Cir. 1991\)](#) (concluding that evidence of defendant’s gang affiliation was relevant to motive); [\*United States v. Lewis\*, 910 F.2d 1367, 1372 \(7th Cir. 1990\)](#) (holding that evidence of gang membership was relevant to prove joint venture). See generally John E. Theuman, Annotation, *Admissibility of Evidence of Accused’s Membership in Gang*, 39 A.L.R.4th 775 (1985).

In CHIPS, UCHIPS, and TPR cases, the prosecution might seek to admit *Whitty* evidence that is too remote in time, *Sanford v. State*, 76 Wis. 2d 72, 81, 250 N.W.2d 348 (1977), or to demonstrate the allegedly bad moral character of the parent. Commentators have noted that these types of cases sometimes function as a “forum for comment on sexual morality” and “to punish women who stray from the straight and narrow path of sexual fidelity or who engage in nonmarital sexual activity.” Lucy Cooper & Patricia Nelson, *Adoption and Termination Proceedings in Wisconsin: A Reply Proposing Limiting Judicial Discretion*, 66 Marq. L. Rev. 641, 644 (1983). Unless the prosecution has shown that the evidence is relevant to the grounds alleged in support of the court’s jurisdiction, the court should rule the evidence inadmissible. See *Wendland v. Wendland*, 29 Wis. 2d 145, 154, 138 N.W.2d 185 (1965). But see *State v. Quinsanna D. (In re Termination of Parental Rts. to Teyon D.)*, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752 (affirming admission of evidence concerning mother’s past criminal offenses—for possession of marijuana, possession of cocaine, keeping a drug house, theft, and obstructing an officer—as relevant to showing her failure to assume parental responsibility).

Before the court can admit relevant *Whitty* evidence, the court must determine that the jury could reasonably find by a preponderance of the evidence that the evidence is true. *State v. Schindler*, 146 Wis. 2d 47, 54, 429 N.W.2d 110 (Ct. App. 1988) (adopting the test of *Huddleston v. United States*, 485 U.S. 681 (1988)).

## F. Competency [§ 9.50]

The Due Process Clause mandates that an accused person not be tried, convicted, or sentenced while mentally incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996), distinguished on other grounds by *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 & n.7 (2017); *Pate v. Robinson*, 383 U.S. 375, 378 (1966). If doubt exists about the competency of an accused person but trial proceeds, the defendant’s right to a fair trial has been denied, and confidence in the trial’s outcome is undermined. *State v. Johnson*, 133 Wis. 2d 207, 223, 395 N.W.2d 176 (1986). State procedures established to determine competency must adequately protect a defendant’s right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

In delinquency proceedings, if probable cause exists that a juvenile committed the alleged offense and is not competent to proceed, under *Wis. Stat.* § 938.295(2)(a), the court must order the juvenile examined by a psychiatrist or licensed psychologist. If defense counsel has “reason to doubt” the juvenile’s competency, then defense counsel must raise the issue of competency with the circuit court. *Johnson*, 133 Wis. 2d at 220.

If a question about the juvenile’s competency has been raised, the circuit court must, after finding probable cause that the juvenile committed the alleged offense, hold a hearing to determine the competency of the juvenile to proceed. The court must hold the competency hearing no later than 10 days after the plea hearing if the juvenile is in secure custody, and no later than 30 days after the plea hearing if the juvenile is not held in secure custody. *Wis. Stat.* § 938.30(5)(a)3.

If the court finds the juvenile competent, the delinquency proceedings resume. *Wis. Stat.* § 938.30(5)(bm).

If the court finds the juvenile not competent to proceed, the court will suspend the proceedings, and either a petition under *Wis. Stat.* § 51.20(1) or a JIPS petition under *Wis. Stat.* § 938.13(14) will be filed. *Wis. Stat.* § 938.30(5)(d)1., 2. *Wis. Stat.* § 51.20(1) governs petitions for involuntary civil commitment.

A juvenile who the court finds incompetent, but who is likely to become competent within the lesser of 12 months or the maximum sentence an adult could receive for the most serious delinquent act charged against the juvenile, must be reexamined every 3 months and within 30 days before the commitment order or dispositional order is scheduled to expire. *Wis. Stat.* § 938.30(5)(e)1. Written reports of each reexamination must be filed with the court, and copies must be provided to the prosecutor and the juvenile’s counsel. *Wis. Stat.* § 938.30(5)(e)1., 2. If a report indicates that the juvenile has regained competency, the court must hold a hearing within 10 days after receiving the report. *Wis. Stat.* § 938.30(5)(e)2. If the court determines at the hearing that the juvenile is competent, the court must then terminate the commitment or dispositional order and resume the delinquency proceeding. *Id.* The court can order the juvenile to continue using any psychotropic medication prescribed to maintain the juvenile’s competence. *Wis. Stat.* § 938.30(5)(e)3.

The Wisconsin Supreme Court has ruled that circuit courts have authority to resume suspended juvenile delinquency proceedings to reexamine the competency of a juvenile who was initially found not competent and not likely to become competent within the statutory time frame and that circuit courts retain competency over juvenile delinquency proceedings even after an accompanying JIPS order has expired. *State v. A.L. (In the Int. of A.L.)*, 2019 WI 20, ¶ 3, 385 Wis. 2d 612, 923 N.W.2d 827. Whether suspended juvenile proceedings *must* be resumed is a separate issue that defense counsel might argue to the court.



The Juvenile Justice Code does not address the problem of representing a young juvenile in a JIPS case based on delinquency who, because of age, is too young to assist in a defense and thereby lacks competency to proceed. The legislature has afforded to juveniles in JIPS cases based on delinquent acts the same rights provided to juveniles alleged to be delinquent. JIPS cases are not criminal in nature, however, because the juvenile's freedom is not at stake. Therefore, due process might not mandate that a six-year-old child have the ability to assist in the child's own "defense" in a JIPS proceeding.

On the other hand, JIPS adjudications based on delinquent acts often operate as enhancements in future delinquency cases (e.g., to justify waiver into adult court). Therefore, JIPS cases based on delinquent acts differ qualitatively from other types of civil cases and, indeed, from CHIPS cases or JIPS cases based on other grounds. In cases in which the county seeks to have an individual involuntarily committed under [Wis. Stat.](#) ch. 51 or [Wis. Stat.](#) ch. 55, defense counsel often faces the problem of representing someone unable to assist in the defense. Indeed, the mental competency of the individual lies at the core of the case. Yet defense counsel still has the duty to hold the county to its burden of proof.

TPR cases are civil in nature. No Wisconsin case has extended the rulings in criminal cases concerning competency to TPR actions. *See Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, [2004 WI 47](#), ¶ 32, 271 Wis. 2d 1, 678 N.W.2d 856; *see also State v. Marquita R. (In re Termination of Parental Rts. to Samara R.)*, Nos. 2010AP1979, 2010AP1980, 2010AP1981, 2010 WL 5075908, ¶ 20 (Wis. Ct. App. Dec. 14, 2010) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (citing *M.W. v. Monroe Cty. Dep't of Hum. Servs. (In re Termination of Parental Rts. to M.A.M.)*, [116 Wis. 2d 432, 442, 342 N.W.2d 410 \(1984\)](#)).

## G. Motion for Court-Ordered Informal Disposition or Deferred Prosecution [§ 9.51]

The child can make a direct appeal to the judge or circuit court commissioner for informal disposition in the case. [Wis. Stat.](#) § 48.21(7) provides as follows:

If the judge or circuit court commissioner determines that the best interests of the child and the public are served or, in the case of a child expectant mother who has been taken into custody under [\[Wis. Stat. §\] 48.19\(1\)\(cm\) or \(d\)8.](#), that the best interests of the unborn child and the public are served, he or she may enter a consent decree under [\[Wis. Stat. §\] 48.32](#) or order the petition dismissed and refer the matter to the intake worker for an informal disposition in accordance with [\[Wis. Stat. §\] 48.245](#).

[Wis. Stat.](#) § 938.21(7) contains similar provisions to allow the juvenile court to refer a matter to an intake worker for deferred prosecution in accordance with [Wis. Stat.](#) § 938.245.

The informal disposition and deferred prosecution procedures give the child or juvenile the opportunity to argue directly to the judge or circuit court commissioner, before adjudication, that the case is not serious enough to require filing a petition or that the case has special factors that should be considered that would make an informal disposition or deferred prosecution appropriate. The decision to order an informal disposition or deferred prosecution will be driven by the particular facts of the case and the child's or juvenile's circumstances.

A CHIPS petition might also be successfully challenged as insufficient if it does not allege "that the child is need of protection and services which can be ordered by the court." *State v. Courtney E. (In the Int. of Courtney E.)*, [184 Wis. 2d 592, 595–96, 516 N.W.2d 422 \(1994\)](#). In *Courtney E.*, the petition alleged that a child was the victim of sexual abuse and therefore should be found to be a child in need of protection or services. The petition was dismissed because it failed to establish that protection or services were needed from the court. The supreme court said,

It is altogether possible, based on the face of the petition, that [the child] is receiving all of the protection and services that she needs from her family. The legislature could not have intended for courts to have jurisdiction over a pregnant minor in such a situation. We conclude that a [\[Wis. Stat. § 48.13\]](#) CHIPS petition is not sufficient unless it contains information which at least gives rise to a reasonable inference sufficient to establish probable cause that there is something that the court could order for the child that is not already being provided. ... [T]he petition must on its face provide a reason, beyond her pregnancy and age, why [the child] is in need of court-ordered protection or services.

*Id.* at 602. This can be a fertile ground for motions to dismiss CHIPS petitions.

**Note.** This basis to dismiss does not apply to JIPS or delinquency petitions.

## V. Practice Forms [§ 9.52]

The forms in this section are offered as practice guides. Always check original sources of authority for current law. When using the sample forms, also check local practice and adapt the form language to fit the client's circumstances. Note that many standard court forms,

such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System's website, at <https://www.wicourts.gov/forms1/circuit.htm>. A list of those standard forms is included in [appendix B](#), *infra*.

### A. Motion for Delivery of Law Enforcement Officers' Reports (Form CRM-0191) [§ 9.53]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

#### MOTION FOR DELIVERY OF LAW ENFORCEMENT OFFICERS' REPORTS

1. (*Juvenile's name*), by *(his) (her)* attorney, moves the court to order the representative of the state to provide (*juvenile's name*) with copies of all law enforcement officers' reports concerning (*juvenile's name*).

2. The grounds for this motion are as follows.

a. An informal request was made pursuant to [Wis. Stat. § 938.293\(1\)](#) for these records, and a copy of this request is appended to this motion.

b. This information is essential for the preparation of (*juvenile's name*)'s defense.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

### B. Order for Delivery of Law Enforcement Officers' Reports (Form CRM-0192) [§ 9.54]

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH \_\_\_\_\_

\_\_\_\_\_ COUNTY

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17

**ORDER FOR DELIVERY OF  
LAW ENFORCEMENT OFFICERS' REPORTS*****[Choose appropriate alternative]******[If hearing held]***

On (date), the court heard (juvenile's name)'s motion for the district attorney to provide (juvenile's name) with copies of all law enforcement officers' reports concerning (juvenile's name). Appearing before the court on the motion were

*(State appearances)****[If hearing not held]***

(Juvenile's name) moved for the district attorney to provide (juvenile's name) with copies of all law enforcement officers' reports concerning (juvenile's name). No hearing was held; the court decided the motion on (date), based on the supporting papers of the parties.

***[Continue]***

IT IS ORDERED that (district attorney's name) will provide to (juvenile's name) all law enforcement officers' reports concerning (juvenile's name).



**C. Demand for Discovery and Inspection (Form CRM-0193) [§ 9.55]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

**DEMAND FOR DISCOVERY  
AND INSPECTION**

TO: *(Prosecutor's Name)*  
District Attorney for *(Name of County)* County  
*(Prosecutor's Address)*

The juvenile, appearing specially by *(his/her)* attorney and reserving *(his/her)* right to challenge the court's jurisdiction, demands that the state provide disclosure, inspection, and copying of the items listed below. This demand is made pursuant to [Wis. Stat. § 971.23](#); U.S. Const. amends. V, VI, and XIV; and Wis. Const. art. I, §§ 1, 7, and 8.

1. All written or recorded statements made by the juvenile concerning the alleged crime that are within the state's possession, custody, or control, including the juvenile's testimony in any John Doe proceeding under [Wis. Stat. § 968.26](#), or before any grand jury, and the names of witnesses to the juvenile's written statements, [Wis. Stat. § 971.23\(1\)\(a\)](#).
2. A written summary of all oral statements of the juvenile that the state plans to use at trial and the names of witnesses to the juvenile's oral statements, [Wis. Stat. § 971.23\(1\)\(b\)](#).
3. The addresses of all witnesses to any written or oral statements made by the juvenile, identified in paragraphs 1 and 2 above.
4. A copy of the juvenile's juvenile record, if any, [Wis. Stat. § 971.23\(1\)\(c\)](#).
5. A list of the names and addresses of all witnesses whom the state intends to call at trial, [Wis. Stat. § 971.23\(1\)\(d\)](#).
6. Any and all relevant written or recorded statements of a witness named on a list under paragraph 5, including any and all audiovisually recorded statements of a child under [Wis. Stat. § 908.08](#), and any reports or statements of experts made in connection with the case, [Wis. Stat. § 971.23\(1\)\(e\)](#); [Brady v. Maryland](#), 373 U.S. 83 (1963); [Nelson v. State](#), 59 Wis. 2d 474, 208 N.W.2d 410 (1973).
7. If an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of the expert's testimony, [Wis. Stat. § 971.23\(1\)\(e\)](#).

8. The results of any physical or mental examination, scientific test, experiment, or comparison that the state intends to offer in evidence at trial, [Wis. Stat. § 971.23\(1\)\(e\)](#).
9. The criminal record and juvenile delinquency record of any and all prosecution witness(es) known to the state, [Wis. Stat. §§ 971.23\(1\)\(f\), 906.09\(1\); Jones v. State, 69 Wis. 2d 337, 230 N.W.2d 677 \(1975\)](#).
10. Any and all physical evidence that the state intends to offer in evidence at the trial, [Wis. Stat. § 971.23\(1\)\(g\)](#), as well as all other physical evidence within the possession, custody, or control of the state or its investigative agencies or agents.
11. Any exculpatory evidence, [Wis. Stat. § 971.23\(1\)\(h\)](#), including but not limited to the following:
  - a. All evidence or other information that would tend to negate the guilt of the juvenile, including laboratory reports, hospital records or reports, police reports, or any other information within the state's possession, knowledge, or control. [Brady v. Maryland, 373 U.S. 83 \(1963\); State v. Ruiz, 118 Wis. 2d 177, 347 N.W.2d 352 \(1984\)](#).
  - b. All evidence or other information that would tend to affect the weight or credibility of the evidence against the juvenile, [Giglio v. United States, 405 U.S. 150 \(1972\); State v. Ruiz, 118 Wis. 2d 177, 347 N.W.2d 352 \(1984\); Ruiz v. State, 75 Wis. 2d 230, 249 N.W.2d 277 \(1977\)](#), including but not limited to the following:
    - (i) Any statements by any individual that may be inconsistent, in whole or in part, with any other statement relevant to the charge by the same individual;
    - (ii) Any statements that are inconsistent, in whole or in part, with any statements made by other individuals who have given statements relevant to the charge against the juvenile;
    - (iii) Any statements or findings by any expert(s) that are inconsistent, in whole or in part, with the statement of any other witness or with any other evidence relevant to the charge against the juvenile; and
    - (iv) Laboratory reports, hospital records or reports, police reports, or any other information within the state's possession, knowledge, or control that would tend to affect the weight and credibility of evidence used against the juvenile.
  - c. Any evidence or other information that would tend to mitigate, extenuate, or affect the degree of the offense charged, or the disposition (including sentencing) of the charge against the juvenile, [Ruiz v. State, 75 Wis. 2d 230, 249 N.W.2d 277 \(1977\)](#).
  - d. Any evidence or other information that would form the basis for further investigation by the defense, [Brady v. Maryland, 373 U.S. 83 \(1963\); Ruiz v. State, 75 Wis. 2d 230, 249 N.W.2d 277 \(1977\)](#).



12. Notice of any conduct of the juvenile the state intends to introduce as an implied admission or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident pursuant to [Wis. Stat. §§ 904.04, 908.03, or 908.045](#); [Whitty v. State](#), 34 Wis. 2d 278, 149 N.W.2d 557 (1967).<sup>[16]</sup>
13. The names and addresses of all persons known by the state to have witnessed any matter related to this case, whether or not the state intends to call them as witnesses at any hearing or trial in this case, [Brady v. Maryland](#), 373 U.S. 83 (1963); [Nelson v. State](#), 59 Wis. 2d 474, 208 N.W.2d 410 (1973).
14. Copies of all written or recorded statements, including audiovisually recorded statements, and a summary of any oral statements made by witnesses, including but not limited to copies of all related police reports, showups, notebooks, memo books, and all other documents prepared by the witnesses, whether or not the state intends to call them to testify at any hearing or trial in this case; [State v. Groh](#), 69 Wis. 2d 481, 230 N.W.2d 745 (1975); [State v. Van Ark](#), 62 Wis. 2d 155, 215 N.W.2d 41 (1974); [Simos v. State](#), 53 Wis. 2d 493, 192 N.W.2d 877 (1972).
15. Copies of any written or recorded statements and a summary of any oral statements made by any accomplice, co-conspirator, or codefendant in connection with this case, [Wis. Stat. § 971.23\(1\)\(e\), \(h\)](#); [Bruton v. United States](#), 391 U.S. 123 (1968); [Brady v. Maryland](#), 373 U.S. 83 (1963); [State v. Van Ark](#), 62 Wis. 2d 155, 215 N.W.2d 41 (1974); [Nelson v. State](#), 59 Wis. 2d 474, 208 N.W.2d 410 (1973).
16. Disclosure of any promises, rewards, or inducements made in connection with this case, either explicitly or implicitly or directly or indirectly, to any person or persons by the state or its agents or by any other person or group, including but not limited to hot lines, crime lines, and tip lines, [Giglio v. United States](#), 405 U.S. 150 (1972); [Ruiz v. State](#), 75 Wis. 2d 230, 249 N.W.2d 277 (1977).
17. Copies of any testimony at any grand jury proceeding or any John Doe proceeding pursuant to [Wis. Stat. § 968.26](#), of any person whom the state intends to call as a witness at any hearing or trial in this case, [Wis. Stat. § 971.23\(1\)\(e\), \(h\)](#).
18. Copies of all photographs of the juvenile and any other persons used in any identification or attempted identification procedure in this case, including photographs of all persons picked out by witnesses in this case; photographs of any lineup or showup in this case, whether or not the juvenile took part; the names and addresses of any witnesses to any lineup or showup; and the name and address of any person identified in those identification procedures, [Simmons v. United States](#), 390 U.S. 377 (1968).
19. An inventory and copies of all books, papers, documents (including electronic data), photographs, and tangible objects related to this case that the state has within its possession, knowledge, or control or that were obtained from or belong to the juvenile, together with the date, time, place, and manner in which these items were obtained, [Wis. Stat. § 968.17](#).
20. Any relevant material or information that has been provided by any informant, including the informant's identity, [McCray v. Illinois](#), 386 U.S. 300 (1967); [Roviaro v. United States](#), 353 U.S. 53 (1957).
21. All information concerning any electronic surveillance of the juvenile's person or premises, [Wis. Stat. §§ 968.27–.37, 971.23\(1\)\(bm\)](#).

Dated \_\_\_\_\_

(Firm/Office name)

Attorneys for (juvenile's name)

[Type "Electronically signed by"]

and your name on this line] \_\_\_\_\_  
(Attorney's name)

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

**D. Motion for Discovery (Form CRM-0194) [§ 9.56]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_

**MOTION FOR DISCOVERY**

(Juvenile's name), by (his) (her) attorney, moves the court, pursuant to [Wis. Stat.](#) §§ 938.293 and 971.23, for the entry of an order requiring the state to disclose to (juvenile's name) all the items of information and evidence previously requested in (juvenile's name)'s Demand for Discovery and Inspection made on (date).

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]

*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**E. Defendant's Response to State's Discovery Demand (Form CRM-0195) [§ 9.57]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_

---

## DEFENDANT'S RESPONSE TO STATE'S DISCOVERY DEMAND

---

TO: *(Prosecutor's Name)*  
 District Attorney for *(Name of County)* County  
*(Prosecutor's Address)*

Pursuant to [Wis. Stat.](#) § 971.23(2m)(a), the juvenile, appearing specially by *(his/her)* attorney and reserving *(his/her)* right to challenge the court's jurisdiction, furnishes the following list of names and addresses of the persons the juvenile intends to call as witnesses at trial.

*(List the names and addresses of all persons the defense  
intends to call as witnesses at trial.)*

Pursuant to [Wis. Stat.](#) § 971.23(2m)(am), (b), and (c), the juvenile has also provided all discoverable material known to defense counsel, subject to the attorney-client privilege, the work-product doctrine, ethical requirements governing confidentiality, and any other exceptions to the disclosure provisions of [Wis. Stat.](#) § 971.23(2m). Counsel acknowledges the duty to promptly supplement this response pursuant to [Wis. Stat.](#) § 971.23(7).

Dated \_\_\_\_\_

*(Firm/Office name)*  
 Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
 and your name on this line]  
 \_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*  
*(Attorney's email address)*  
*(Attorney's telephone number)*  
 State Bar No. \_\_\_\_\_

### F. Letter to Request Inspection or Delivery of Records (Form CRM-0196) [§ 9.58]

*(Date)*

*(Custodian of records—social services, schools)*  
*(Address)*

Dear *(Name)*:

I represent *(juvenile's name)*, who is the subject of a pending juvenile court proceeding in *(name of county)* County. Your records about *(juvenile's name)* will be relevant in a hearing scheduled on *(date)*.

***[Choose appropriate alternative]***

I will appear at your office with any necessary releases at *(time)* on *(date)*, to inspect your records and to obtain copies of such records.

***[or]***



Please send me copies of your records about (juvenile's name). I have enclosed all necessary releases.

**[Continue]**

This request is made pursuant to [Wis. Stat.](#) § 938.293(2).

Sincerely,

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

---

*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**G. Release and Motion for Inspection of Records (Form CRM-0197) [§ 9.59]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_



## RELEASE AND MOTION FOR INSPECTION OF RECORDS <sup>[17]</sup>

### RELEASE <sup>[18]</sup>

(I) (we), (juvenile's name) (juvenile's parents' names), give (my) (our) permission to the custodian(s) of the following records to release them to (attorney's name), attorney for (juvenile's name):

1. \_\_\_\_\_  
(Identify records)
2. \_\_\_\_\_

Dated \_\_\_\_\_

\_\_\_\_\_  
(Juvenile's name) (Juvenile's parents' names)

### MOTION FOR INSPECTION OF RECORDS

1. (Juvenile's name), by (his) (her) attorney, moves the court, pursuant to [Wis. Stat. § 938.293\(2\)](#), for permission to inspect the following records:

- a. \_\_\_\_\_  
(Identify records)
- b. \_\_\_\_\_

2. The grounds for this motion are that these records are relevant to the (name of proceeding) that is to be held (date) in this court.

Dated \_\_\_\_\_

(Firm/Office name)  
Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]  
\_\_\_\_\_  
(Attorney's name)

(Attorney's address)  
(Attorney's email address)  
(Attorney's telephone number)  
State Bar No. \_\_\_\_\_

## H. Order for Inspection of Records (Form CRM-0198) [§ 9.60]

---

|                    |                               |              |
|--------------------|-------------------------------|--------------|
| STATE OF WISCONSIN | CIRCUIT COURT<br>BRANCH _____ | _____ COUNTY |
|--------------------|-------------------------------|--------------|

---

|   |                |
|---|----------------|
| In the Interest of<br>_____<br>A Person Under the Age of 17 | Case No. _____ |
|---|----------------|

---



**ORDER FOR INSPECTION OF RECORDS** <sup>[19]</sup>***[Choose appropriate alternative]******[If hearing held]***

On (date), the court heard (juvenile's name)'s motion for inspection of records. Appearing before the court on the motion were

*(State appearances)****[If hearing not held]***

(Juvenile's name) moved for permission to inspect records. No hearing was held; the court decided the motion on (date), based on the supporting papers of the parties.

***[Continue]***

IT IS ORDERED that, pursuant to [Wis. Stat.](#) §§ 938.293(2), 938.396, and 938.78, the custodian(s) of the following records allow (attorney's name), attorney for (juvenile's name), to inspect and copy these records:

1.

*(Identify records)*

2.

**I. Motion for Protection of Records (Form CRM-0199) [§ 9.61]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

A Person Under the Age of 17

Case No. \_\_\_\_\_





## MOTION FOR PROTECTION OF RECORDS <sup>[LJ]</sup>

1. *(District attorney's name)*, a representative of the State of Wisconsin, *(name of county)* County, moves the court, pursuant to [Wis. Stat. § 938.293\(2\)](#), to review the attached records and to order counsel for *(juvenile's name)*, a juvenile, not to disclose the following information to *(the juvenile)* *(the juvenile's parents)*:

- a. \_\_\_\_\_  
*(State information)*
- b. \_\_\_\_\_

2. The grounds for this motion are as follows.

a. This information is sensitive, and its discovery at this time and in this manner would be destructive to the mental health of the juvenile and to relationships in *(his)* *(her)* family.

b. This information need not be disclosed to the juvenile to enable *(him)* *(her)* to properly assist counsel in the preparation of the defense case.

Dated \_\_\_\_\_

[Type "Electronically signed by"  
and your name on this line]

*(District Attorney)*

County \_\_\_\_\_

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

### J. Motion to Suppress Physical Evidence (Form CRM-0200) [§ 9.62]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17

---

### MOTION TO SUPPRESS PHYSICAL EVIDENCE

---

1. (Juvenile's name), by *(his) (her)* attorney, moves the court to suppress all physical items that might be used as evidence against *(him) (her)*, including but not limited to (specify item(s)).



2. The grounds for this motion are as follows. <sup>[21]</sup>

a. On (date), (juvenile's name) was taken into custody by (name of person taking into custody) for allegedly (describe allegation).

b. (Juvenile's name) was taken into custody without probable cause to believe (he) (she) had committed an act of misconduct and without any of the grounds for taking a juvenile into custody provided in [Wis. Stat. § 938.19](#).

c. (Juvenile's name) was taken into custody without a court warrant, capias, or order.

d. While (juvenile's name) was being taken into custody, certain property was unlawfully seized.

e. (Name of person taking into custody) was without authority to take (juvenile's name) into custody or otherwise deprive (him) (her) of (his) (her) liberty and property and thus took (him) (her) into custody in violation of U.S. Const. amends. IV, V, and XIV, and Wis. Const. art. I, §§ 8 and 11.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

### K. Motion to Suppress Statements (Form CRM-0201) [§ 9.63]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_

**MOTION TO SUPPRESS STATEMENTS**

1. (Juvenile's name), by *(his) (her)* attorney, moves the court to suppress as evidence all statements, confessions, or admissions of (juvenile's name), whether oral or written, recorded or recollected, that were made at and after the time when *(he) (she)* was taken into custody.

2. The grounds for this motion are as follows.

a. On (date), (juvenile's name) was taken into custody by (name of person taking into custody), for allegedly (describe allegation).





**[If applicable]** <sup>144</sup>

b. After taking *(juvenile's name)* into custody, *(name of person taking into custody)* failed to deliver *(him)* *(her)* to the intake worker of this *(court)* *(county)* as required by [Wis. Stat. § 938.20\(3\)](#) within *(number)* hours.

c. While *(name of person taking into custody)* held *(juvenile's name)* in custody, *(his)* *(her)* parents were not notified of the apprehension, as is required by [Wis. Stat. § 938.20\(8\)](#).

d. The presence of *(juvenile's name)*'s parents were essential to *(him)* *(her)* to make a reasoned judgment whether to waive the constitutional right to the presence of counsel before making any statements that might be incriminating.

e. The lack of the guidance of *(his)* *(her)* parents rendered *(juvenile's name)* incapable of an intelligent and reasonable waiver of *(his)* *(her)* constitutional rights because *(juvenile's name)* is *(number)* years of age and has had no prior experience with law enforcement practices.

f. Any statements made by *(juvenile's name)* during the *(number)* hours *(he)* *(she)* was held before delivery to the intake worker should be suppressed because *(juvenile's name)* was held in custody in violation of [Wis. Stat. ch. 938](#).

g. Any statements made by *(juvenile's name)* during that time should be suppressed also because any waiver of rights that *(he)* *(she)* may have made during that time was ineffective and was not done in a knowing, intelligent, and reasoned manner because *(he)* *(she)* lacked the guidance of *(his)* *(her)* parents due to failure of *(name of person taking into custody)* to notify them of *(his)* *(her)* apprehension.

h. Any statements made by *(juvenile's name)* should be suppressed because the statements were not recorded by audio or audio and visual means as required under [Wis. Stat. § 938.195\(2\)](#), and none of the conditions under [Wis. Stat. § 938.31\(3\)\(c\)1.–5.](#) applies.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**L. Motion to Suppress Identification (Form CRM-0202) [§ 9.64]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

---

**MOTION TO SUPPRESS IDENTIFICATION**

---

1. (Juvenile's name), by *(his) (her)* attorney, moves the court to suppress as evidence the identification testimony of certain witnesses in this case.
2. The grounds for this motion are as follows.
  - a. On (date), (juvenile's name) was taken into custody by (name of person taking into custody) for allegedly (describe allegation) and was held in custody at (location) until (date and time) without a court order and without having been interviewed by an intake worker.
  - b. There was no probable cause to make this apprehension.
  - c. There was no authority to hold (juvenile's name) without the court order or intake interview required by [Wis. Stat. §§ 938.19, 938.20, and 938.205](#).
  - d. While held at (location) by (name of person holding juvenile), (juvenile's name) was required to stand before certain witnesses in circumstances that were unnecessarily suggestive and in a manner that would cause the witnesses to point out (juvenile's name). These circumstances were (state circumstances).
  - e. On information and belief, the witnesses present at the confrontation were:
    - (1) \_\_\_\_\_
    - (2) \_\_\_\_\_

*(List witnesses)*
  - f. The identification by these and any other witnesses who were at the confrontation that occurred (date) at (time) should be suppressed as evidence because they were obtained in violation of (juvenile's name)'s rights secured by U.S. Constitution amends. V, XIV; Wis. Const. art. 1, § 8 and [Wis. Stat. ch. 938](#).
  - g. Although the standard card giving notice of the right to counsel was read at the time of apprehension, (juvenile's name) did not understand this to include the right to counsel at the pretrial confrontation; and further, no effort was made to secure counsel for (juvenile's name) at the confrontation, to notify *(his) (her)* parents of the proposed confrontation, or in any other way explain to (juvenile's name) that the confrontation constituted a significant point in the development of the state's case against *(him) (her)*. Thus, the identification testimony should also be suppressed as evidence because it was obtained in violation of (juvenile's name)'s rights secured by the U.S. Constitution amends. VI and XIV and Wis. Const. art. 1, § 7.

Dated \_\_\_\_\_

\_\_\_\_\_  
 (Firm/Office name)  
 Attorneys for (juvenile's name)

[Type "Electronically signed by"  
 and your name on this line]  
 \_\_\_\_\_  
 (Attorney's name)

(Attorney's address)  
 (Attorney's email address)  
 (Attorney's telephone number)  
 State Bar No. \_\_\_\_\_

**M. [Motion for Severance of Juvenile Defendants \(Form CRM-0203\)](#)**

**[§ 9.65]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
 BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_

**MOTION FOR SEVERANCE  
 OF JUVENILE DEFENDANTS**

1. (Juvenile's name), by (his) (her) attorney, moves the court, pursuant to [Wis. Stat. § 971.12\(3\)](#), for the entry of an order granting a severance and separate trial of the juvenile defendants.

2. The grounds for this motion are that joinder with the other defendant(s) in the same trial would be prejudicial for the following reasons.

**[Choose appropriate alternative(s)]**

a. A juvenile codefendant, (codefendant's name), has made a confession implicating (juvenile's name) that would be inadmissible if (juvenile's name) were tried alone, but that would be admitted in evidence at a joint trial.

b. A juvenile codefendant, (codefendant's name), has a lengthy record of delinquency that would be prejudicial to (juvenile's name) if the codefendant were to testify.

c. (Juvenile's name)'s defense and the defense of codefendant (codefendant's name) are antagonistic, in that

(1)

(State reasons)

(2)

Dated \_\_\_\_\_

(Firm/Office name)

Attorneys for (juvenile's name)

\_\_\_\_\_  
(Attorney's name)

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

## **N. Motion to Sever Charges (Form CRM-0204)**

[§ 9.66]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_

A Person Under the Age of 17

Case No. \_\_\_\_\_

### **MOTION TO SEVER CHARGES**

1. (Juvenile's name), by (his) (her) attorney, moves the court, pursuant to [Wis. Stat. § 971.12\(3\)](#), to sever the charges now pending against (him) (her) pursuant to the petition filed in this matter and requests separate trials of the issues.

2. The grounds for this motion are that if tried together the counts will unduly prejudice the trier of fact in that the content of one is likely to be confused with that of the other(s), and inferences drawn from evidence in the one may be applied to the other(s), thereby denying (juvenile's name) due process of law.

Dated \_\_\_\_\_

(Firm/Office name)

Attorneys for (juvenile's name)

\_\_\_\_\_  
(Attorney's name)

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

**O. Motion to Suppress (Form CRM-0205) [§ 9.67]**STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

**MOTION TO SUPPRESS**TO: (District attorney's name)  
(District Attorney's office)  
(Name of county) County

1. (Juvenile's name), by *(his) (her)* attorney, moves the court for an order suppressing all evidence seized from *(him) (her)* on (date).
2. The grounds for this motion are as follows.
  - a. The evidence was seized illegally and in violation of (juvenile's name)'s constitutional rights.
  - b. More specifically, the search of (juvenile's name) was made without obtaining a search warrant, and there were no exigent circumstances or probable cause requiring such a search.
  - c. Further, it is alleged that the search was not incident to a lawful arrest and that, under [Wis. Stat.](#) § 968.25 and [add appropriate case(s)], reaching into (juvenile's name)'s pockets was a violation of *(his) (her)* Fourth Amendment rights.

Dated \_\_\_\_\_

(Firm/Office name)  
Attorneys for (juvenile's name)[Type "Electronically signed by"  
and your name on this line]  
(Attorney's name)(Attorney's address)  
(Attorney's email address)  
(Attorney's telephone number)  
State Bar No. \_\_\_\_\_**VI. Standard Juvenile Court Forms [§ 9.68]**

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose   |
|--------------------------|---------------------------|---|---|
| <a href="#">JD-1731</a>  | Both                      | Petition for Examination or Assessment                                  | Form for interested person to request the court to order a physical, psychological, mental, or developmental examination or AODA assessment of a child/juvenile/parent/guardian/legal custodian                             |
| <a href="#">JD-1732</a>  | Both                      | Order for Examination or Assessment                                     | Court findings and order directing that a physical, psychological, mental, or developmental examination or AODA assessment take place concerning a child/juvenile/parent/guardian/legal custodian                           |
| <a href="#">JD-1733</a>  | Ch. 938                   | Order Concerning Competency or Mental Responsibility Determination      | Court order concerning determination of whether juvenile is competent to proceed or not responsible by reason of mental disease or defect   |
| <a href="#">JD-1734A</a> | Both                      | Consent of Child/Juvenile to Medical Services                           | Child/juvenile consent for medical services   |
| <a href="#">JD-1734B</a> | Both                      | Medical Authorization   | Court authorization of medical services for a child/juvenile  |
| <a href="#">JD-1738A</a> | Both                      | Request to Inspect Juvenile Court Records                               | Standardized form for requesting access to juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed                             |
| <a href="#">JD-1738B</a> | Both                      | Order to Inspect Juvenile Court Records                                 | Court order to allow access to juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed   |
| <a href="#">JD-1739A</a> | Both                      | Request and Authorization to Open Juvenile Court Records for Inspection | Standardized form for authorization by certain parties to access child/juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed |
| <a href="#">JD-1739B</a> | Both                      | Order on Request to Open Juvenile Court Records for Inspection          | Court order to open juvenile court records for inspection   |
| <a href="#">JD-1748</a>  | Both                      | Order Dismissing Petition   | Formal order dismissing petition in juvenile court  |

## Supplement Chapter 10

# Fact-Finding Hearing

Book section supplemented: [10.1](#)

**Note:** In the opinion of the authors, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2022–23 revision.

## 10.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024).

## Chapter 10

# Fact-Finding Hearing

## I. [Scope of Chapter](#)

### [§ 10.1]

This chapter discusses fact-finding hearings in proceedings involving children in need of protection and services (CHIPS proceedings), unborn children in need of protection and services (UCHIPS proceedings), juveniles in need of protection and services (JIPS proceedings), and juveniles alleged to be delinquent (delinquency proceedings), all of which are governed by [Wis. Stat.](#) §§ 48.31 and 938.31. This chapter does not attempt an in-depth discussion of civil and criminal trial practice; rather, the chapter focuses on those aspects of the fact-finding hearing unique to juvenile trial practice. Where the Wisconsin Children’s Code ([Wis. Stat.](#) ch. 48) and the Wisconsin Juvenile Justice Code ([Wis. Stat.](#) ch. 938) explicitly incorporate procedures from the rules governing civil and criminal trial practice, the chapter will identify those provisions in the rules of civil procedure and the Criminal Code, with discussion limited to case law examining those provisions in the context of [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 cases.<sup>1</sup>

Also, it should be noted that this chapter generally does not examine fact-finding hearings as they relate to termination-of-parental-rights cases or waiver proceedings. [Wis. Stat.](#) § 48.42 governs fact-finding hearings in termination-of-parental-rights cases, for which [Wis. Stat.](#) § 48.31(1) specifies the burden of proof as clear and convincing evidence, except for cases involving Indian children. In cases involving Indian children, allegations under [Wis. Stat.](#) § 48.42(1)(e) relating to serious emotional or physical damage must be proved beyond a reasonable doubt as provided in [Wis. Stat.](#) § 48.028(4)(e)1., unless the court grants partial summary judgment on the grounds for termination of parental rights, in which case the court must make determinations about such allegations at the dispositional hearing. See *infra* [ch. 17](#) (termination of parental rights). [Wis. Stat.](#) § 938.18 governs waiver hearings. See *infra* [ch. 14](#) (waiver into adult court).

## II. What Is a Fact-Finding Hearing? [§ 10.2]

Through a fact-finding hearing, the court determines whether evidence supports the allegations of a petition. In delinquency cases pursuant to [Wis. Stat.](#) § 938.12 and JIPS cases based on delinquency pursuant to [Wis. Stat.](#) § 938.13(12), the state has the burden of proving beyond a reasonable doubt that the juvenile committed the crime alleged in the petition. [Wis. Stat.](#) § 938.31(1). In this respect, delinquency fact-finding hearings resemble criminal trials. In nondelinquency JIPS cases pursuant to [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), in CHIPS cases pursuant to [Wis. Stat.](#) § 48.13, and in UCHIPS cases pursuant to [Wis. Stat.](#) § 48.133, the prosecutor must prove by clear and convincing evidence the grounds alleged in the petition. [Wis. Stat.](#) §§ 938.31(1), 48.31(1). In nondelinquency JIPS cases involving Indian



juveniles, in addition to addressing the grounds alleged in the petition at the fact-finding hearing, the court must determine whether continued custody of the Indian juvenile by the Indian juvenile's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian juvenile under [Wis. Stat. § 938.028\(4\)\(d\)1.](#) and whether active efforts under [Wis. Stat. § 938.028\(4\)\(d\)2.](#) have been made to prevent the breakup of the Indian juvenile's family and whether those efforts have proved unsuccessful; these additional requirements do not apply if the court grants partial summary judgment on the allegations under [Wis. Stat. § 938.13\(4\), \(6\), \(6m\), or \(7\),](#) in which case the court must make those determinations at the dispositional hearing. [Wis. Stat. § 938.31\(5\).](#)

In CHIPS and UCHIPS cases, the court acts as the fact-finder at the fact-finding hearing unless the child, parent, guardian, or legal custodian, in CHIPS cases, or the expectant mother or the unborn child's guardian ad litem, in UCHIPS cases, requests a jury trial before or during the plea hearing. [Wis. Stat. § 48.31\(2\).](#) See [chapter 9, supra](#), for a discussion of motions and other requests that must be made at or before the plea hearing. In delinquency and JIPS cases, the court always acts as the fact-finder in the fact-finding hearing. [Wis. Stat. § 938.31\(2\).](#)

**Comment.** There is no federal or state constitutional right to a trial by jury in the adjudicative phase of a juvenile delinquency proceeding; however, the right to a jury trial can be granted by statute. *N.E. v. Wisconsin Dep't of Health & Soc. Servs. (In the Int. of N.E.)*, 122 Wis. 2d 198, 201, 361 N.W.2d 693 (1985). Under the former Children's Code, children alleged to be delinquent (as well as children alleged to be in need of protection or services) had a right to a jury trial. [Wis. Stat. § 48.31\(2\)](#) (1993–94). In enacting the Juvenile Justice Code, the Wisconsin Legislature removed the right to trial by jury in cases under [Wis. Stat. ch. 938.](#) Defense counsel who want to challenge the denial of jury trials for juveniles alleged to be delinquent or who are subject to JIPS proceedings should familiarize themselves with *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The Court in *McKeiver* held that the U.S. Constitution does not require jury trials in juvenile delinquency proceedings. To the extent that the juvenile justice system grows ever more similar to the adult system, due process might require jury trials for juveniles who are alleged to be delinquent or in need of protection or services.

### III. Procedure [§ 10.3]

#### A. Notice [§ 10.4]

After the filing of a petition alleging a juvenile to be delinquent or a child to be in need of protection or services, the court must notify the following individuals of the plea hearing: the child and the parent, guardian, or legal custodian, as well as any foster parent, or other physical custodian, as defined in [Wis. Stat. § 48.62\(2\),](#) and, in CHIPS cases, any court-appointed special advocate (CASA) for the child. [Wis. Stat. §§ 48.27\(3\)\(a\), \(e\), 938.27\(3\)\(a\).](#) After the filing of a petition alleging an unborn child of a child expectant mother to be in need of protection or services, the court must notify the following persons of the plea hearing: the child expectant mother, her parent, guardian or legal custodian, any foster parent, or other physical custodian, the unborn child's guardian ad litem, and any alleged father. [Wis. Stat. § 48.27\(3\)\(a\), \(b\).](#) After the filing of a petition alleging an unborn child of an adult expectant mother to be in need of protection or services, the court must notify the unborn child's guardian ad litem, the expectant mother, and the physical custodian of the expectant mother. [Wis. Stat. § 48.27\(3\)\(c\).](#) The court must make every reasonable effort to identify and notify any person who has filed a declaration of paternal interest (see [Wis. Stat. § 48.025](#)), any person conclusively determined from genetic test results to be the father, any person who has acknowledged paternity of the child, and any person already adjudged the father of the child in a judicial proceeding, unless his parental rights have been terminated. [Wis. Stat. §§ 48.27\(5\), 938.27\(5\).](#) ([Wis. Stat. § 48.025](#) allows any person asserting his paternity of a nonmarital child who is not adopted or whose parents do not subsequently intermarry and whose paternity has not been established to file a declaration of interest in matters affecting the child.) After the filing of a petition in a CHIPS, UCHIPS, or nondelinquency JIPS case involving an Indian child who has been removed from the home of his or her parent or Indian custodian or a situation under [Wis. Stat. § 48.133](#) involving an unborn child who, when born, will be an Indian child, the court must notify the Indian child's Indian custodian and tribe or the Indian tribe with which the unborn child might be eligible for affiliation when born, and that Indian custodian or tribe may intervene at any point in the proceeding. [Wis. Stat. §§ 48.27\(3\)\(d\), 938.27\(3\)\(d\).](#)

The first notice to any interested party must be in writing and may have the petition attached. [Wis. Stat. §§ 48.27\(3\)\(a\), 938.27\(3\)\(a\).](#) The first notice to a child's CASA in a CHIPS proceeding must also be written, and it must have a copy of the petition attached to it. [Wis. Stat. § 48.27\(3\)\(e\).](#) Subsequent notice, including notice of the fact-finding hearing, can be given by telephone at least 72 hours before the hearing. [Wis. Stat. §§ 48.27\(3\)\(a\), \(e\), 938.27\(3\)\(a\).](#) A person giving notice by telephone must place a signed statement in the case file indicating the time of giving notice and the name of the individual to whom the person giving the notice spoke. [Wis. Stat. §§ 48.27\(3\)\(a\), \(e\), 938.27\(3\)\(a\).](#)

In CHIPS cases and UCHIPS cases involving a child expectant mother, as well as delinquency and JIPS cases, the notice must contain the name of the child and the nature, location, date, and time of the hearing. [Wis. Stat. §§ 48.27\(4\)\(a\)1., 938.27\(4\)\(a\).](#) The notice must also advise the child and any party, if applicable, of the right to counsel regardless of ability to pay. [Wis. Stat. §§ 48.27\(4\)\(a\)2., 938.27\(4\)\(b\).](#) In UCHIPS cases involving an expectant mother who is an adult, the notice must contain the name of the adult expectant mother and the

nature, location, date, and time of the hearing. [Wis. Stat. § 48.27\(4\)\(b\)1](#). The notice must also advise the adult expectant mother of her right to legal counsel regardless of ability to pay. [Wis. Stat. § 48.27\(4\)\(b\)2](#).

Notice can be served by mail. [Wis. Stat. §§ 48.273\(1\)\(a\), 938.273\(1\)\(a\)](#). (For service requirements specifically applicable in a CHIPS, UCHIPS, or nondelinquency JIPS case involving an Indian child who has been removed from the home of the child's parent or Indian custodian, or involving an unborn child who, when born, will be an Indian child, see [Wis. Stat. §§ 48.028\(4\)\(a\) and 938.028\(4\)\(a\)](#). [Wis. Stat. §§ 48.273\(1\)\(ag\), 938.273\(1\)\(ag\)](#).) If individual who receive notice by mail fail to appear or otherwise to acknowledge service, the court generally must grant a continuance. [Wis. Stat. §§ 48.273\(1\)\(ar\), 938.273\(1\)\(ar\)](#). Service must then be made personally, unless the court deems it impracticable, in which case the court can order service by certified mail addressed to the last-known addresses of the individuals. [Wis. Stat. §§ 48.273\(1\)\(ar\), 938.273\(1\)\(ar\)](#). The court may refuse to grant a continuance, however, if the child is being held in secure custody. Under such circumstances, the court must order that service of notice of the next hearing occur personally or by certified mail to the person's last-known address. [Wis. Stat. §§ 48.273\(1\)\(b\), 938.273\(1\)\(b\)](#). The court of appeals has held that pursuant to the provisions of the state statute governing service, the state can obtain personal jurisdiction over members of the Menominee Indian tribe. [M.L.S. v. State \(In the Int. of M.L.S.\)](#), 157 Wis. 2d 26, 31, 458 N.W.2d 541 (Ct. App. 1990).

Notice by mail generally must be sent at least seven days before the hearing. [Wis. Stat. §§ 48.273\(1\)\(c\), 938.273\(1\)\(c\)](#). For notice by mail of CHIPS and JIPS hearings in which the person to receive notice lives outside the Wisconsin, notice must be sent at least 14 days before the hearing. [Wis. Stat. §§ 48.273\(1\)\(c\)1., 938.273\(1\)\(c\)1](#). Personal service must occur at least 72 hours before the hearing. [Wis. Stat. §§ 48.273\(1\)\(c\), 938.273\(1\)\(c\)](#). An unpublished court of appeals decision has held that the court cannot reduce the 72-hour period for giving notice. *W.W.C. v. State (In the Int. of D.L.C.)*, Nos. 90-2741-FT, 90-2742-FT, 1991 WL 101333 (Wis. Ct. App. Apr. 25, 1991) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)). In a CHIPS, UCHIPS, or nondelinquency JIPS case involving an Indian child who has been removed from the home of the Indian child's parent or Indian custodian, and the person to be notified is the Indian child's parent, Indian custodian, or tribe, the person must receive notice by mail at least 10 days before the hearing; if that person's identity or location cannot be determined, the U.S. Secretary of the Interior instead must receive notice by mail at least 15 days before the hearing. [Wis. Stat. §§ 48.273\(1\)\(c\)2., 938.273\(1\)\(c\)2](#).

In addition to the notice requirements, the statutes provide that the court can issue a summons requiring the person who has legal custody of the child or child expectant mother to appear personally and, if the court orders, to bring the child or child expectant mother before the court at the time and place stated in the notice. [Wis. Stat. §§ 48.27\(1\), 938.27\(1\)](#). In UCHIPS cases involving an adult expectant mother, the court can issue a summons requiring the adult expectant mother to appear personally before the court at the time and place stated in the notice. [Wis. Stat. § 48.27\(1\)\(b\)](#). The court can also issue a summons requiring the appearance of any other person whose presence the court deems necessary. [Wis. Stat. §§ 48.27\(2\), 938.27\(2\)](#).

Any person who has been summoned to appear and who fails to do so without reasonable cause can be prosecuted for contempt of court. [Wis. Stat. §§ 48.28, 938.28](#). The court can issue a *capias* for the parent or guardian or for the child if the summons cannot be served, if the parties served fail to obey the summons, or when the court concludes that service will prove ineffectual. [Wis. Stat. §§ 48.28, 938.28](#).

## B. Who May Be Present [§ 10.5]

### 1. Public Hearings [§ 10.6]

In CHIPS and UCHIPS cases, the public cannot attend fact-finding hearings unless the child through the child's counsel, an expectant mother through her counsel, or an unborn child's guardian ad litem demands a public hearing. [Wis. Stat. § 48.299\(1\)\(a\)](#). The court must refuse to grant the public hearing if a parent, guardian, expectant mother, or unborn child's guardian ad litem objects. *Id.* This provision does not apply to proceedings under [Wis. Stat. § 48.375\(7\)](#), which governs judicial waiver of parental consent for abortion. *See infra* [ch. 18](#).

In delinquency and JIPS cases, the public cannot attend fact-finding hearings unless the juvenile, through the juvenile's counsel, demands a public hearing. [Wis. Stat. § 938.299\(1\)\(a\)](#). The court must refuse to grant the public hearing if the victim of an alleged sexual assault objects or, in a nondelinquency JIPS proceeding, if the parent or guardian objects. *Id.*

In addition to being able to attend hearings that the child, expectant mother, or unborn child's guardian ad litem has demanded be public, the public can attend the fact-finding hearing of a juvenile alleged to have committed a felony if the juvenile has a prior delinquency adjudication. [Wis. Stat. § 938.299\(1\)\(ar\)1](#). The public can also attend the fact-finding hearing of a juvenile alleged to have committed a violation specified in [Wis. Stat. § 938.34\(4h\)\(a\)](#). [Wis. Stat. § 938.299\(1\)\(ar\)1](#); *see also* [Wis. Stat. § 938.34\(4h\)\(a\)](#) (serious juvenile offender program). Even in these cases, however, the court must exclude the general public if the victim of an alleged sexual assault objects. [Wis. Stat. § 938.299\(1\)\(ar\)2](#).

Furthermore, the court can, in its discretion, exclude the public from portions of the fact-finding hearing that deal with sensitive personal matters of the juvenile or the juvenile's family and that do not relate to the alleged act committed by the juvenile. *Id.*

## 2. Hearings Closed to the Public [§ 10.7]

In CHIPS, UCHIPS, JIPS, and delinquency cases in which the fact-finding hearing is not to be public, the parties, their counsel or a guardian ad litem, the CASA for the child (if any), witnesses, and "other persons requested by a party and approved by the court" can attend. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(a). Also, the court can admit any other person (including a member of the bar) that the court finds to have a "proper interest" in the case or in the work of the court. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(a). The legislature has expanded the list of persons with a proper interest who can attend these confidential hearings to include specifically a person engaged in the bona fide research, monitoring, or evaluation of activities conducted under federal law, 42 [U.S.C.](#) § 629h, as determined by the director of state courts. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(a). This federal law is related to the entitlement funding for state courts to assess and improve the handling of proceedings relating to foster care and adoption. Finally, the child's foster parent or other physical custodian can attend the fact-finding hearing, unless (1) the court excludes one of those individuals from portions of the hearing that deal with sensitive personal matters of the child or the child's family, or (2) the court determines that excluding the foster parent or other physical custodian is in the best interest of the child. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(ag).

Additionally, in delinquency and JIPS cases, victims of the juvenile's alleged act can attend the fact-finding hearing if they are not witnesses subject to a sequestration order. [Wis. Stat.](#) §§ 938.299(1)(am), 906.15. A member of the victim's family can also attend, as well as (at the victim's request) a representative of an organization providing support services to the victim. [Wis. Stat.](#) § 938.299(1)(am). By statute, the court can exclude victims from portions of the fact-finding hearing that deal with sensitive personal matters of the juvenile or the juvenile's family and that do not directly relate to the alleged act committed by the juvenile. *Id.* In 2020, Wisconsin voters approved the "Marsy's Law" amendment to the Wisconsin Constitution, *see* Wis. Const. art. I, § 9m (regarding rights of crime victims), so victims might prevail in arguing that the amendment gives them a constitutional right "to attend all proceedings involving the case." Wis. Const. art. I, § 9m(2)(e). It will be up to individual judges to decide whether that provision means that victims cannot be excluded for any portion of the proceedings.

Finally, in delinquency and JIPS cases, a representative of the news media can attend the fact-finding hearing for the purpose of reporting news without revealing the identity of the juvenile involved. [Wis. Stat.](#) § 938.299(1)(a).

## 3. Exclusion of Child in CHIPS Cases [§ 10.8]

In all CHIPS hearings, the court can, with the consent of the child's attorney or guardian ad litem, temporarily exclude the child upon a finding that exclusion will serve the best interest of the child. [Wis. Stat.](#) § 48.299(3). The court can exclude from the entire hearing a child under seven years of age if the court finds that the child is too young to comprehend the hearing and further finds that exclusion will serve the child's best interest. *Id.*

## 4. Telephonic or Live Audiovisual Testimony [§ 10.9]

For cases in children's court, nothing in [Wis. Stat.](#) ch. 48 specifically allows or prohibits use of telephonic or live audiovisual testimony for fact-finding. The only mention of use of telephonic or live audiovisual testimony in the chapter is found in [Wis. Stat.](#) § 48.299(5), and that provision specifically permits telephonic or live audiovisual testimony in detention hearings and detention-review hearings but does not refer to other types of cases at all. Pursuant to [Wis. Stat.](#) § 807.13(2) and its reference to [Wis. Stat.](#) ch. 48 cases, the children's court can hold hearings, including evidentiary hearings, by telephone or live audiovisual means or receive telephonic or live audiovisual testimony if the criteria in [Wis. Stat.](#) § 807.13(2) are met. These criteria include the requirement that testimony be subject to cross-examination. In addition, either the parties must stipulate to the use of telephone or live audiovisual means or the proponent must show good cause to the court to allow testimony by telephone or live audiovisual means. [Wis. Stat.](#) § 807.13(2).

For cases in juvenile court, [Wis. Stat.](#) ch. 938 was recently amended to clearly allow the court, upon motion of the juvenile or prosecutor or upon its own motion, to conduct any hearing on the record by telephone or live audiovisual means, if available. [Wis. Stat.](#) §§ 938.299(5)(a), 938.325. However, "[i]f the juvenile or the prosecutor objects to the use of telephone or live audiovisual means for a critical stage of the proceedings, the court shall sustain the objection." [Wis. Stat.](#) § 938.299(5)(b). A fact-finding hearing would certainly be considered a critical stage of the proceedings; thus, a fact-finding hearing should only be done by telephonic or live audiovisual means if both the juvenile and the prosecutor agree to waiving in-person appearances.

## C. Time Periods [§ 10.10]

## 1. In General [§ 10.11]

The court must hold the fact-finding hearing no more than 20 days after the plea hearing for a child held in secure custody, and no more than 30 days after the plea hearing for a child or expectant mother not held in secure custody. [Wis. Stat.](#) §§ 48.30(7), 938.30(7). The same time periods apply to CHIPS, UCHIPS, JIPS, and delinquency cases, except in CHIPS cases, UCHIPS cases, and nondelinquency JIPS cases pursuant to [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) involving Indian children. If at any point in these proceedings the court determines or has reason to know that the child is an Indian child, the court must provide notice of the proceeding to the child's parent, Indian custodian, and tribe in the manner specified in [Wis. Stat.](#) §§ 48.028(4)(a) and 938.028(4)(a). The next hearing in the proceeding cannot be held until at least 10 days after receipt of the notice by the parent, Indian custodian, and tribe or, if the identity for location of the parent, Indian custodian, or tribe cannot be determined, until at least 15 days after receipt of the notice by the U.S. Secretary of the Interior. On request of the parent, Indian custodian, or tribe, the court must grant a continuance of up to 20 additional days to enable the requester to prepare for that hearing. [Wis. Stat.](#) §§ 48.299(9), 938.299(10).

Under both [Wis. Stat.](#) chs. 48 and 938, “[f]ailure ... to act within any time period ... does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction.” [Wis. Stat.](#) §§ 48.315(3), 938.315(3). Furthermore, failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). If the court or a party fails to act within an applicable statutory time period, the court may order any of the following: dismissal without prejudice, release of the child from secure or nonsecure custody or from the terms of a custody order, and any other relief that the court considers appropriate. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In addition, in [Wis. Stat.](#) ch. 938 cases, courts can dismiss a petition *with* prejudice. [Wis. Stat.](#) § 938.315(3). This remedy is not available under [Wis. Stat.](#) ch. 48. *See* [Wis. Stat.](#) § 48.315(3); *see also* 2007 Wis. Act 199.

## 2. Exclusions and Continuances [§ 10.12]

The court can exclude (i.e., toll) certain periods when computing time requirements. For continuances based on claims that a period should be excluded under [Wis. Stat.](#) § 48.315(1) or [Wis. Stat.](#) § 938.315(1), the court can grant such continuances only for good cause shown on the record and must grant the continuance before the expiration of the mandatory time period in question. [Wis. Stat.](#) §§ 48.315(2), 938.315(2); *M.G. v. La Crosse Cnty. Hum. Servs. Dep't (In the Int. of G.H.)*, 150 Wis. 2d 407, 441 N.W.2d 227 (1989); *J.R. v. State (In re J.R.)*, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989); *T.H. v. La Crosse Cnty. (In the Int. of R.H.)*, 147 Wis. 2d 22, 39, 433 N.W.2d 16 (Ct. App. 1988), *aff'd by an equally divided court*, 150 Wis. 2d 432, 441 N.W.2d 233 (1989). The supreme court stressed the importance of the good-cause finding being made on the record and in open court in *Sheboygan County Department of Social Services v. Matthew S. (In re Termination of Parental Rights to Joshua S.)*, 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631. In that case, the court noted that the trial judge's granting of a continuance by simply sending out notice of a rescheduled hearing, after both the state and counsel for the father had submitted letters requesting a rescheduled hearing, did not comport with these guidelines because there was no determination of good cause in open court or during a telephone conference on the record. *Id.* ¶ 24. For a useful discussion of the proper evaluation of good cause, see *State v. Robert K. (In re Termination of Parental Rights to Moriah K.)*, 2005 WI 152, 286 Wis. 2d 143, 706 N.W.2d 257.

Failure by counsel to object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3).

[Wis. Stat.](#) §§ 48.315(1) and 938.315(1) list those periods excluded when computing mandatory time periods:

1. Any period of delay resulting from other actions concerning the child or the unborn child and the unborn child's expectant mother—including psychological evaluations, hearings related to the mental condition of the child, the child's parent, guardian, or legal custodian, or the expectant mother, prehearing motions, waiver motions, and hearings on other matters—is excluded in computing time periods. [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.

**Note.** [Wis. Stat.](#) §§ 48.295 and 938.295 govern psychological evaluations. Presumably, when measuring the time period in which to hold the fact-finding hearing, to allow for a psychological evaluation, the court should exclude the time from the date the court orders the evaluation until the date the expert has completed the evaluation; it should *not* exclude the time between the expert's completion of the evaluation and the date the parties have reviewed the evaluations or the date the expert is ready to testify. If a party needs a continuance for the party to review the evaluations or for the expert to prepare testimony, the party should ask the juvenile court to determine whether good cause exists for a continuance. For a discussion of how a waiver hearing affects the time periods for holding the plea hearing, see [chapter 8](#), *supra*.



2. Any period of delay resulting from a continuance granted at the request or with the consent of the child *and* counsel, or of the unborn child's guardian ad litem, is excluded. [Wis. Stat.](#) §§ 48.315(1)(b), 938.315(1)(a)2.

**Comment.** The plain language of the statutes mandates that the child personally agree to the continuance. The child's silence when the court sets a date beyond the time period does not constitute consent. *T.H.*, 147 Wis. 2d at 38–39.

3. Any period of delay caused by the disqualification of a judge, including a substitution of judge filed by a juvenile, is excluded. [Wis. Stat.](#) §§ 48.315(1)(c), 938.315(1)(a)3.

**Note.** In one unpublished decision, the court of appeals has held that only the time elapsing between the date of filing the request for substitution of judge and the date of the assignment of a new judge can be excluded from computing the period. *Steven W.R. v. State (In the Int. of Steven W.R.)*, No. 92-1569-FT, 1992 WL 355135 (Wis. Ct. App. Sept. 16, 1992) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). Reassignment of a judge because of docket congestion does not amount to disqualification of a judge under [Wis. Stat.](#) § 48.315(1)(c). *Brown Cnty. v. Shannon R. (In re Termination of Parental Rts. to Daniel R.S.)*, 2005 WI 160, ¶¶ 87–89, 286 Wis. 2d 278, 706 N.W.2d 269.

4. In delinquency and JIPS cases, any period of delay caused by the transfer of the case or intake inquiry to a different judge, intake worker, or county is excluded. [Wis. Stat.](#) § 938.315(1)(a)3.

5. Any period of delay resulting from a continuance granted at the request of the prosecutor is excluded, but only if:

- a. The prosecutor has exercised due diligence to obtain material evidence that has been unavailable, if reasonable grounds exist to believe that the evidence will be available at a later date; or
- b. The prosecutor needs additional time to prepare the case, and the exceptional circumstances of the case justify additional time. [Wis. Stat.](#) §§ 48.315(1)(d), 938.315(1)(a)4.

**Comment.** Any continuance requested by the prosecutor can rest only on these grounds. The prosecutor must demonstrate that he or she exercised “due diligence” but the evidence (or witness) remains unavailable. The prosecutor must also demonstrate the materiality of the evidence. Although the statute does not define “due diligence,” the notion of due diligence under the rules of evidence focuses on the diligence of attempts to procure the attendance of a witness, and a party must make diligent attempts as a condition for invoking unavailability in both civil and criminal cases. *La Barge v. State*, 74 Wis. 2d 327, 336, 246 N.W.2d 794 (1976). Therefore, case law defining due diligence under the rules of evidence might prove instructive. Both the hearsay statute, *see generally* [Wis. Stat.](#) ch. 908, and [Wis. Stat.](#) §§ 48.315(1)(d) and 938.315(1)(a)4. involve the same subject matter (unavailability of witnesses after due diligence to procure their attendance). Statutes relating to the same subject matter must be construed together. *Pulaski State Bank v. Kalbe*, 122 Wis. 2d 663, 665, 364 N.W.2d 162 (Ct. App. 1985); *see also* [Wis. Stat.](#) § 990.01(1) (providing that words and phrases that have a “peculiar meaning in the law shall be construed according to such meaning”). A witness is not unavailable unless the prosecutor has made a good-faith effort to procure his or her attendance at trial. *State v. Zellmer*, 100 Wis. 2d 136, 301 N.W.2d 209 (1981). The prosecutor must state with specificity what efforts the prosecutor made to obtain the evidence or procure the attendance of the witness.

The court can grant a continuance for further preparation only if the prosecutor demonstrates the “exceptional” circumstances of the case. Assertions by the prosecutor of inability to prepare because of workload will not suffice. Something exceptional about the case itself must make adequate preparation impossible in the allotted time. This provision resembles the continuance provision in the “speedy trial” statute, [Wis. Stat.](#) § 971.10(3)(b)2., which requires that the case be “so unusual and so complex ... that it is unreasonable to expect adequate preparation within the periods of time established by this section.”

6. In delinquency and JIPS cases, any period of delay resulting from court congestion or scheduling is excluded. [Wis. Stat.](#) § 938.315(1)(a)5.; *see also* *J.R. v. State (In re J.R.)*, 152 Wis. 2d 598, 449 N.W.2d 52 (Ct. App. 1989).

**Note.** For a discussion of a continuance granted as a result of court congestion and lawyer availability in the context of a [Wis. Stat.](#) ch. 48 proceeding, *see* *State v. Robert K. (In re Termination of Parental Rights to Moriah K.)*, 2005 WI 152, 286 Wis. 2d 143, 706 N.W.2d 257.

7. Any period of delay because of the imposition of a consent decree is excluded. [Wis. Stat.](#) §§ 48.315(1)(e), 938.315(1)(a)6. [Wis. Stat.](#) §§ 48.32 and 938.32 govern consent decrees. *See* [chapter 8, supra](#), for a discussion of consent decrees.
8. Any period of delay resulting from the absence or unavailability of the child or expectant mother is excluded. [Wis. Stat.](#) §§ 48.315(1)(f), 938.315(1)(a)7.

**Comment.** Published decisions have not addressed whether the state's failure to produce a child held in secure custody for a hearing constitutes absence or unavailability under this provision. Because the other circumstances listed under [Wis. Stat.](#) §§ 48.315(1) and 938.315(1) clearly concern conscious, affirmative action taken by the parties, counsel could argue that the state's negligence in bringing a child to a hearing cannot constitute good cause under [Wis. Stat.](#) §§ 48.315 and 938.315. *But see Charleston D. v. State (In the Int. of Charleston D.)*, No. 92-2450-FT, 1993 WL 85379 (Wis. Ct. App. Jan. 26, 1993) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In this unpublished decision, the court implied that the state, although not acting in bad faith, had responsibility for producing the child for the hearing.

**Practice Tip.** If the state requests a continuance and a child is in secure custody, defense counsel should insist on the child's release if the continuance is granted.

9. Any period of delay resulting from the inability of the court to provide the child with notice of an extension hearing because the child ran away or otherwise made himself or herself unavailable to receive that notice is excluded. [Wis. Stat.](#) §§ 48.315(1)(fm), 938.315(1)(a)8. [Wis. Stat.](#) §§ 48.365 and 938.365 govern extension hearings. *See infra* [ch. 12](#) (postdispositional hearings).
10. A reasonable period of delay when the child is joined in a hearing with another child and the time periods for the other child have not expired is excluded, but only if good cause exists for not hearing the cases separately. [Wis. Stat.](#) §§ 48.315(1)(g), 938.315(1)(g).
11. Any period of delay resulting from the need to appoint a qualified interpreter is excluded. [Wis. Stat.](#) §§ 48.315(1)(h), 938.315(1)(a)9.
12. In a delinquency case, any period of delay is excluded that results from a consultation between an intake worker or prosecutor with tribal officials, under [Wis. Stat.](#) § 938.24(2r) or [Wis. Stat.](#) § 938.25(2g), regarding certain Indian juveniles who are alleged to have committed delinquent acts while outside the tribe's reservation under a tribal court order. [Wis. Stat.](#) § 938.315(1)(a)10.
13. In CHIPS, UCHIPS, and nondelinquency JIPS cases, a reasonable period of delay, not to exceed 20 days, in a proceeding involving the out-of-home care placement of a child or termination of parental rights to a child whom the court knows or has reason to know is an Indian child, resulting from a continuance granted at the request of the child's parent, Indian custodian, or tribe to enable the requester to prepare for the proceeding, is excluded. [Wis. Stat.](#) §§ 48.315(1)(j), 938.315(1)(a)11.

The circuit court's authority to grant a continuance under [Wis. Stat.](#) §§ 48.315(2) and 938.315(2) is not limited to the specific circumstances listed in [Wis. Stat.](#) §§ 48.315(1) and 938.315(1). *M.G.*, 150 Wis. 2d at 418; *J.R.*, 152 Wis. 2d at 607. For example, the supreme court upheld a juvenile court judge's decision sua sponte to adjourn the fact-finding hearing in a CHIPS case beyond the 30-day mandatory time limit because of the absence of the parents' attorney. *M.G.*, 150 Wis. 2d 407.

Relevant factors for the court to consider when deciding whether good cause exists include (1) the best interest of the child (in [Wis. Stat.](#) ch. 48 cases), (2) whether the party seeking enlargement of the time period has acted in good faith, (3) prejudice (or lack of it) to the opposing party, and (4) whether the dilatory party took prompt action to remedy the situation. *F.E.W. v. State (In the Int. of F.E.W.)*, 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988); *see also Robert K.*, 2005 WI 152, 286 Wis. 2d 143. In any event, the court can grant the continuances only for good cause and must grant them in a timely manner (i.e., before the time period has expired).

### 3. Reasonable Efforts Findings [§ 10.13]

[Wis. Stat.](#) §§ 48.315(2m) and 938.315(2m) recognize three situations when the court's ability to grant a continuance or extend a time period is limited under [Wis. Stat.](#) chs. 48 and 938. The first situation stems from the requirement that the court find, within 60 days after the child is removed from the home, that reasonable efforts have been made to prevent the removal of the child from the home, or that such efforts are not required because of a circumstance under [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4., within 60 days after the child was removed from the home. No continuance or extension of a time period may be granted, and no period of delay can be excluded, in computing the time periods under [Wis. Stat.](#) chs. 48 and 938 if the continuance, extension, or exclusion would prevent those findings from being made within the 60 days. [Wis. Stat.](#) §§ 48.315(2m)(a), 938.315(2m)(a).

**Note.** At certain points during the pendency of a case, the court must make findings about the reasonableness of efforts the responsible department or agency has made to prevent removal of the child from the child's home. For example, the court must make such findings at a detention hearing (see [chapter 5](#), *supra*, for a discussion of detention hearings), a dispositional hearing (see [chapter 11](#), *infra*, for a discussion of dispositional hearings), and a change-in-placement hearing (see [chapter 12](#), *infra*, for a discussion of change-in-placement hearings). The court need not make a "reasonable efforts" finding if it determines that the parent has subjected the child to "aggravated circumstances," including abandonment, torture, chronic abuse, or sexual abuse; the parent has committed certain specified crimes, such

as attempted homicide, against a child of the parent; the parent has committed certain specified crimes, such as sexual assault, resulting in great bodily harm or substantial bodily harm against the child or another child of the parent; the parent has committed child trafficking against a child of the parent; the parental rights of the parent to another child have been involuntarily terminated; or, under [Wis. Stat.](#) ch. 48, the parent relinquished custody of the child when the child was 72 hours old or younger. [Wis. Stat.](#) §§ 48.355(2d)(b)1.–5., 938.355(2d)(b)1.–4.

The second situation, under [Wis. Stat.](#) §§ 48.315(2m)(b) and 938.315(2m)(b), stems from the timelines for permanency hearings under [Wis. Stat.](#) §§ 48.38(5m) and 938.38(5m). The court must find that the agency responsible for providing services has made reasonable efforts to achieve the permanency goal of the permanency plan within 12 months after the child was removed from the home or within 12 months after the court’s last finding regarding reasonable efforts toward meeting the permanency goal. Therefore, no continuance or extension of a time period can be granted, and no period of delay can be excluded, in computing the time periods under [Wis. Stat.](#) chs. 48 and 938 if the continuance, extension, or exclusion would prevent those findings from being made within the 12 months. [Wis. Stat.](#) §§ 48.315(2m)(b), 938.315(2m)(b). Permanency hearings must take place (for each child for whom a permanency plan is required) no later than 12 months after the date the child was first removed from the home and every 12 months after that. These 12-month periods include trial reunifications under [Wis. Stat.](#) §§ 48.358 and 938.358. [Wis. Stat.](#) §§ 48.38(5m)(a), 938.38(5m)(a).

The third situation, under [Wis. Stat.](#) §§ 48.315(2m)(c) and 938.315(2m)(c), arises in cases involving extended out-of-home case placements for certain older children who are qualifying full-time students and have an individualized education program (IEP). See [Wis. Stat.](#) §§ 48.366, 938.366. A person who qualifies for such a placement (or the person’s guardian) and the responsible agency can enter into a transition-to-independent-living agreement under which the person continues in out-of-home care and continues to be a full-time student under an IEP until the person attains 21 years of age, is granted a high school or high school equivalency diploma, or terminates the agreement. After evaluating the agreement under a best-interests standard, the court must then grant or deny an order to continue the placement “no later than 180 days after the date on which the transition-to-independent-living agreement is entered into.” [Wis. Stat.](#) §§ 48.366(3)(am)3., 938.366(3)(am)3. [Wis. Stat.](#) §§ 48.315(2m)(c) and 938.315(2m)(c) prohibit continuances, extensions, and delays of time periods that would cause the court to make the necessary best-interests finding under [Wis. Stat.](#) §§ 48.366(3)(am)3. or 938.366(3)(am)3. after the requisite 180-day period.

## D. Use of Depositions Taken by Audiovisual Means [§ 10.14]

The rules of evidence ([Wis. Stat.](#) chs. 901–911) apply to fact-finding hearings. [Wis. Stat.](#) §§ 48.299(4)(a), 938.299(4)(a). See also [Rusecki v. State](#), 56 Wis. 2d 299, 307, 201 N.W.2d 832 (1972), holding that the “essentials of due process and fair treatment” require the exclusion of hearsay in delinquency trials unless the evidence falls within one of the exceptions to the hearsay rule. Also see [Crawford v. Washington](#), 541 U.S. 36 (2004), involving an adult criminal prosecution in which the U.S. Supreme Court held that, when testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

**Note.** The U.S. Supreme Court’s increased attention to the Confrontation Clause in *Crawford* has spawned a corresponding increase in attention at both the state and federal levels. As one might expect in light of the holding in *Crawford*, other cases have since focused on whether a statement is *testimonial*. For examples of the discussion surrounding whether an out-of-court statement is testimonial, see *United States v. Gilbertson*, 435 F.3d 790, 794–96 (7th Cir. 2006), *State v. Manuel*, 2005 WI 75, ¶¶ 36–53, 281 Wis. 2d 554, 697 N.W.2d 811, *State v. Keller*, 2021 WI App 22, 397 Wis. 2d 122, 959 N.W.2d 343 (concluding that the confidential statements of persons reporting concerns about a child’s well-being to child protective services employees were not testimonial because their primary purpose was to improve the treatment and conditions of the child, not to “gather evidence for” or “substitute for testimony in” a criminal prosecution) (review denied), and *State v. Searcy*, 2006 WI App 8, ¶¶ 40–54, 288 Wis. 2d 804, 709 N.W.2d 497.

If a case involves a child victim or if a child witness is expected to testify at the fact-finding hearing, the court can order that the child’s deposition be taken by audiovisual means under [Wis. Stat.](#) § 967.04(7)–(10). [Wis. Stat.](#) §§ 48.31(2), 938.31(2); see also [Wis. Stat.](#) § 950.02(1), (4)(a)1., (5) (20m)(a)1. (definitions). [Wis. Stat.](#) § 967.04(7)–(10) outlines the procedures for taking a deposition by audiovisual means of a child “who has been or is likely to be called as a witness” in a criminal proceeding or any proceeding under [Wis. Stat.](#) chs. 48 and 938. The court can order an audiovisually recorded deposition only if the child will be (1) younger than 12 years old at the time of the hearing or (2) younger than 16 years old and the interests of justice warrant an audiovisually recorded deposition. [Wis. Stat.](#) § 967.04(7)(a). [Wis. Stat.](#) § 967.04(7)(b) sets forth the factors relevant to the court’s determination whether to order an audiovisually recorded deposition in the interests of justice. If the court orders an audiovisually recorded deposition, the court and the prosecutor must comply with [Wis. Stat.](#) § 971.105, which mandates that they “take appropriate action to ensure a speedy trial” so as to minimize any adverse effects on the child. [Wis. Stat.](#) §§ 48.31(2), 938.31(2), 971.105.

**Note.** In addition to being able to order depositions to be taken by audiovisual means under [Wis. Stat.](#) § 967.04(7)–(10), the court can admit into evidence the audiovisual recording of an oral statement of a child pursuant to [Wis. Stat.](#) § 908.08 even if the child is available



to testify at trial. The most common example of this is a Child Advocacy Center forensic interview. The criteria for admission of these statements are laid out in the statute ([Wis. Stat.](#) § 908.08) and have the same limitations based on age as do the depositions. Child Advocacy Center forensic interviews are designed to meet the statutory criteria.

## E. Jury Selection [§ 10.15]

There is no jury in delinquency or JIPS proceedings. If a jury is requested in a CHIPS or UCHIPS proceeding, the jury consists of six people. [Wis. Stat.](#) § 48.31(2). The jury in a termination of parental rights proceeding consists of 12 people unless the parties agree to a lesser number. *Id.*; see *infra* [ch. 17](#).

[Wis. Stat.](#) chs. 756 and 805 govern jury selection in CHIPS and UCHIPS fact-finding hearings. [Wis. Stat.](#) § 48.31(2).

This chapter does not discuss the specific procedure for jury selection as provided in the rules of civil procedure. *But see generally* Eric L. Andrews et al., [Wisconsin Trial Practice](#) ch. 3 (State Bar of Wis. 4th ed. 2019 & Supp.). Questions have arisen, however, regarding the role of the guardian ad litem in the jury selection process in CHIPS fact-finding hearings, particularly whether the guardian ad litem has a right to peremptory challenges and, if so, how many. The supreme court resolved this issue in [Waukesha County Department of Social Services v. C.E.W. \(In the Interest of C.E.W.\)](#), 124 Wis. 2d 47, 368 N.W.2d 47 (1985). The court held that, under [Wis. Stat.](#) § 805.08(3), the guardian ad litem shares peremptory challenges with the party with which the guardian ad litem aligns—the county or the parent. *Id.* at 67. Although *C.E.W.* involved termination of parental rights, *C.E.W.* would apply to CHIPS or UCHIPS cases because the decision rested on [Wis. Stat.](#) § 805.08(3) as applied to fact-finding hearings under [Wis. Stat.](#) § 48.31. In an unpublished decision, the court of appeals applied *C.E.W.* and reversed a CHIPS dispositional order because the court had given the guardian ad litem three peremptory challenges without a showing that the guardian ad litem and the county had adverse interests. *M.V. v. Fond du Lac Cnty. Dep't of Soc. Servs. (In the Int. of M.V.)*, Nos. 87-1170, 87-1171, 87-1172, 87-1173, 1988 WL 36837 (Wis. Ct. App. Feb. 10, 1988) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The court held that the parent's right to seek an impartial jury through peremptory challenges was prejudiced and that she therefore deserved a new trial.

**Note.** The Children's Code does not include any provision governing jury instructions. In *C.E.W.*, the supreme court held, however, that the procedure set forth in [Wis. Stat.](#) § 805.13(3) for objecting to jury instructions applies to termination of parental rights fact-finding hearings. *C.E.W.*, 124 Wis. 2d at 53; see also *infra* [ch. 17](#) (termination of parental rights).

## F. Applicability of Rules of Civil Procedure [§ 10.16]

[Wis. Stat.](#) chs. 801–847, the rules of civil procedure, generally apply to CHIPS fact-finding hearings, unless a statute or rule prescribes a different procedure. [Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W. \(In the Int. of C.E.W.\)](#), 124 Wis. 2d 47, 53, 368 N.W.2d 47 (1985). This rule would apply to UCHIPS fact-finding hearings as well. This rule comes with an important caveat, however. [Wis. Stat.](#) ch. 48 proceedings potentially involve interests far more substantial than those in civil cases. Consequently, the rules of civil procedure cannot be engrafted onto fact-finding hearings in CHIPS or UCHIPS cases without deference to the many constitutional and statutory rights provided to parents, expectant mothers, and children in these types of proceedings. See *supra* [ch. 3](#) (rights of parties). Additionally, in [State ex rel. Kenneth S. v. Circuit Court](#), 2008 WI App 120, 313 Wis. 2d 508, 756 N.W.2d 573, the court of appeals ruled that [Wis. Stat.](#) § 805.04(1), which refers to the voluntary dismissal of a case, does not apply in a CHIPS proceeding. Once a district attorney has filed a CHIPS petition, under [Wis. Stat.](#) § 48.24(4), the district attorney can withdraw it only with the approval of the court. This procedure is different from and inconsistent with the two dismissal options under [Wis. Stat.](#) § 805.04(1)—for a plaintiff to serve and file a notice of dismissal or for the parties to sign and file a stipulation of dismissal—because neither of the latter options requires court approval. *Id.* ¶ 25.

## IV. Prosecutor's Proof [§ 10.17]

The prosecutor in delinquency cases and JIPS cases based on delinquency must prove beyond a reasonable doubt that the juvenile committed the offense charged. [Wis. Stat.](#) § 938.31(1). In nondelinquency JIPS cases and CHIPS or UCHIPS cases, the prosecutor must prove by clear and convincing evidence the grounds alleged in the petition. *Id.*; [Wis. Stat.](#) § 48.31(1).

## V. Findings of Fact and Conclusions of Law [§ 10.18]

In delinquency and JIPS cases, the trier of fact (i.e., the court) decides the juvenile's guilt or innocence of the offense or offenses alleged in the petition. [Wis. Stat.](#) § 938.31(4). The trier of fact, whether judge or jury, determines as questions of fact the elements of a CHIPS petition under [Wis. Stat.](#) § 48.13 or a UCHIPS petition under [Wis. Stat.](#) § 48.133. [Wis. Stat.](#) § 48.31(4).

[Wis. Stat.](#) § 48.31(4) requires that the court make conclusions of law relating to the allegations of CHIPS or UCHIPS petitions. [Wis. Stat.](#) § 48.31(4) also requires the court to make findings of fact relating to whether the child or unborn child is in need of protection or services that the court can order.

[Wis. Stat.](#) § 938.31(4) requires that the court make conclusions of law in delinquency and JIPS cases. In delinquency cases and JIPS cases based on delinquency, the court must also make findings “relating to the proof of the violation of law and to the proof that the juvenile named in the petition committed the violation alleged.” [Wis. Stat.](#) § 938.31(4). The court cannot amend the petition to conform to the proof at the close of evidence without prior notice to the juvenile. Such an amendment violates the juvenile’s due-process right to notice. [State v. Tawanna H. \(In the Int. of Tawanna H.\)](#), 223 Wis. 2d 572, 590 N.W.2d 276 (Ct. App. 1998).

The court has certain legal determinations to make after the verdict in a CHIPS case under [Wis. Stat.](#) § 48.13(11), which provides jurisdiction over a child who suffers emotional damage for which the parent or guardian has neglected, refused, or been unable, for reasons other than poverty, to obtain necessary treatment. For a child alleged to be in need of protection or services under this section, the court can find that the child has suffered serious emotional damage, but only if a court-appointed psychiatrist or licensed psychologist who has examined the child has testified that the condition exists and the parent has had an opportunity to cross-examine the expert. [Wis. Stat.](#) § 48.31(4). See [chapter 2, supra](#), for a discussion of parents’ rights of confrontation and cross-examination in CHIPS cases. If the child’s guardian ad litem or legal counsel and the parent or guardian waive their right to have testimony presented, the judge can use the expert’s written reports in lieu of live testimony. [Wis. Stat.](#) § 48.31(4). [Wis. Stat.](#) § 48.02(5j) defines *emotional damage* as “harm to a child’s psychological or intellectual functioning as evidenced by severe anxiety, depression, withdrawal, outward aggressive behavior, or a substantial and observable change in behavior, emotional response, or cognition that is not within the normal range for the child’s age and stage of development.” See [M.Q. v. Z.Q. \(In the Int. of H.Q.\)](#), 152 Wis. 2d 701, 449 N.W.2d 75 (Ct. App. 1989).

The court also has certain legal determinations to make in CHIPS cases under [Wis. Stat.](#) § 48.13(11m) or UCHIPS cases under [Wis. Stat.](#) § 48.133. [Wis. Stat.](#) § 48.13(11m) provides jurisdiction over a child who suffers from severe alcohol and other drug abuse impairment for which the parent or guardian is neglecting, refusing, or unable to provide treatment. In these cases, the child or unborn child can only be found in need of protection or services if the court finds that the child or the expectant mother of the unborn child is “in need of treatment and education for needs and problems related to the use or abuse of alcohol beverages, controlled substances, or controlled substance analogs and its medical, personal, family or social effects.” [Wis. Stat.](#) § 48.31(4). The court can make this finding, however, only if the child or expectant mother has undergone a drug and alcohol assessment by an approved treatment facility. The assessment must be done pursuant to the criteria of [Wis. Stat.](#) § 48.547(4), which requires the Department of Children and Families to develop uniform alcohol and other drug abuse assessment criteria.

## VI. Summary Judgment [§ 10.19]

The court cannot entertain motions for summary judgment in delinquency cases. In a criminal case, even when the state’s evidence is overwhelming, granting summary judgment to the state “would be anathema to all of our precepts of constitutional law.” [State v. Koput](#), 142 Wis. 2d 370, 392, 418 N.W.2d 804 (1988).

The court of appeals has approved the use of summary judgment in CHIPS proceedings when no material issue of fact exists. [N.Q. v. Milwaukee Cty. Dep’t of Soc. Servs. \(In the Int. of F.Q.\)](#), 162 Wis. 2d 607, 470 N.W.2d 1 (Ct. App. 1991).

**Comment.** In *N.Q.*, the CHIPS petition, based on [Wis. Stat.](#) § 48.13(8), alleged that the child received inadequate care during the parent’s incarceration. Applying [Waukesha County Department of Social Services v. C.E.W. \(In the Interest of C.E.W.\)](#), 124 Wis. 2d 47, 368 N.W.2d 47 (1985), the court rejected the appellant’s argument that summary judgment did not apply in CHIPS cases because [Wis. Stat.](#) ch. 48 does not have a summary-judgment provision. *N.Q.*, 162 Wis. 2d at 611. Notwithstanding *N.Q.*, a challenge to the use of summary judgment in CHIPS or UCHIPS cases might still exist on the ground that the procedure improperly relieves the county entirely of its burden of proof. See [In re Christina T.](#), 590 P.2d 189 (Okla. 1979) (holding that summary judgment in CHIPS case improperly relieved the state entirely of its burden of proof).

## VII. Standard Juvenile Court Forms [§ 10.20]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B, infra](#).

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number             | Ch. 48, Ch. 938, or Both?                  | Name of Form  | Purpose   |
|-------------------------|--|---|---|
| <a href="#">IW-1720</a> | Ch. 48/Ch. 938 (nondelinquency JIPS cases) | Summons—Indian Child Welfare Act                      | Court order requiring a person to appear in court when the case involves an Indian child                                      |
| <a href="#">IW-1724</a> | Ch. 48/Ch. 938 (nondelinquency JIPS cases) | Notice of hearing (juvenile)—Indian Child Welfare Act | Notice informing interested persons of the scheduling of court proceedings in a case involving a child who is subject to ICWA |
| <a href="#">JD-1714</a> | Both                                       | Capias  | Court order to take a child or other person involved in juvenile court into custody   |
| <a href="#">JD-1720</a> | Both                                       | Summons   | Court order requiring a person to appear in court   |
| <a href="#">JD-1724</a> | Both                                       | Notice of hearing (juvenile)                          | Notice informing individuals involved in a case of a scheduled court proceeding   |

## Supplement Chapter 11

### Dispositional Hearing

Book sections supplemented: [11.1](#), [11.10](#), [11.14](#), [11.21](#), [11.25](#), [11.26](#), [11.41](#), [11.45](#), [11.52](#), and [11.62](#)

#### 11.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Sept. 2024, No. 825.

#### 11.10 [Procedure] [Court Reports] When the Report Must Be in Writing

[Pages 11–12: Replaced second paragraph in section](#)

Under both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, the agency must submit a written report if the report recommends placing the child in a foster home, a group home, a residential care center for children and youth, the home of a relative other than a parent, the home of like-kin, the home of a guardian under [Wis. Stat.](#) § 48.977(2), or a supervised independent living arrangement. [Wis. Stat.](#) §§ 48.33, 938.33, *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). Also under [Wis. Stat.](#) ch. 48, the agency must submit a written report if the report recommends placing an adult expectant mother outside her home.

[Page 12: Amended Wis. Stat. citation in item \(6\) in Note after paragraph 2. in numbered list in section](#)

**Note.** The circumstances specified in [Wis. Stat. § 48.355\(2d\)\(b\)1.–5.](#) or [Wis. Stat. § 938.355\(2d\)\(b\)1.–4.](#) include the following: (1) the parent has subjected the child to aggravated circumstances, including abandonment, torture, chronic abuse, or sexual abuse; (2) the parent has committed, has aided or abetted the commission of, or has solicited, conspired, or attempted to commit first-degree intentional homicide, second-degree intentional homicide, first-degree reckless homicide, or felony murder against the parent’s child; (3) the parent has committed certain specified crimes, such as sexual assault, against the child, resulting in great bodily harm or substantial bodily harm against the child or another child of the parent; (4) the parent has committed child trafficking against a victim who was the parent’s child; (5) the parental rights of the parent to another child have been involuntarily terminated; or (6) the parent has been found to have relinquished custody of the child under [Wis. Stat. § 48.195\(1m\)](#) when the child was 72 hours old or younger. See [Wis. Stat. §§ 48.355\(2d\)\(b\)1.–5., 938.355\(2d\)\(b\)1.–4.](#)

## 11.14 [Procedure] [Permanency Plan] What Is a Permanency Plan

[Pages 14–15: Amended last textual sentence and last citation in second paragraph in section](#)

The agency primarily responsible for providing services to a child living in a foster home, group home, residential care center for children and youth, juvenile detention facility, see [Wis. Stat. §§ 48.02\(10r\), 938.02\(10r\)](#), shelter care facility, see [Wis. Stat. §§ 48.02\(17\), 938.02\(17\)](#), qualifying residential family-based treatment facility, see [Wis. Stat. § 48.02\(14m\)](#), or supervised independent living arrangement must prepare a written permanency plan if one of the following conditions exists: (1) the child is being held in physical custody under [Wis. Stat. § 48.207](#) or [938.207](#), [Wis. Stat. § 48.208](#) or [938.208](#), or [Wis. Stat. § 48.209](#) or [938.209](#), [Wis. Stat. §§ 48.38\(2\)\(a\), 938.38\(2\)\(a\)](#); see also *supra* [ch. 5](#) (discussion of physical custody); (2) the agency has legal custody of the child, [Wis. Stat. §§ 48.38\(2\)\(b\), 938.38\(2\)\(b\)](#); (3) the child is under the supervision of an agency pursuant to a dispositional order or voluntary agreement, [Wis. Stat. §§ 48.38\(2\)\(c\), 938.38\(2\)\(c\)](#); see also [Wis. Stat. §§ 48.355, 48.32, 48.63, 48.64, 938.355, 938.32](#); (4) the child was placed under a voluntary agreement between the agency and the child’s parent under [Wis. Stat. § 48.63\(1\)\(a\) or \(bm\) or \(5\)\(b\) or Wis. Stat. § 938.63\(1\)\(a\) or \(5\)\(b\) or under a voluntary transition-to-independent-living agreement under Wis. Stat. § 48.366\(3\) or 938.366\(3\), Wis. Stat. §§ 48.38\(2\)\(d\), 938.38\(2\)\(d\)](#); (5) the child is under the guardianship of the agency, [Wis. Stat. §§ 48.38\(2\)\(e\), 938.38\(2\)\(e\)](#); see also [Wis. Stat. § 48.023](#); (6) the child’s care would have been paid for under [Wis. Stat. § 49.19](#) (the state’s former program for aid to families with dependent children (AFDC)), [Wis. Stat. §§ 48.38\(2\)\(f\), 938.38\(2\)\(f\)](#), except if the child’s care is being paid for under [Wis. Stat. § 48.623\(1\)](#) (subsidized guardianships); or (7) the child’s parent is placed in a foster home, group home, residential care center for children and youth, juvenile detention facility, shelter care facility, or supervised independent living arrangement, and the child is residing with that parent, [Wis. Stat. § 48.38\(2\)\(g\)](#). In the case of a child placed in the home of a guardian, a relative other than a parent, or like-kin, the agency must prepare a permanency plan if one of the first five conditions listed above exists. See [Wis. Stat. §§ 48.38\(2\)\(a\)–\(e\), 938.38\(2\)\(a\)–\(e\)](#), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

[Page 16: Amended paragraph 14. in numbered list in section](#)

14. The services that will be provided to the child, the child’s family, and the child’s foster parent, the operator of the facility in which the child is placed, or the relative or like-kin with whom the child is living to carry out the dispositional order, [Wis. Stat. §§ 48.38\(4\)\(f\), 938.38\(4\)\(f\)](#), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice);

## 11.21 [Procedure] [Dispositional Orders] Contents

[Page 22: Replaced paragraph 9. in numbered list in section](#)

9. For a child placed outside the home, the court’s finding that continued placement of the child in the home would be contrary to the welfare of the child (or, in a delinquency case, if the juvenile is placed in a relative’s home, the home of like-kin, a foster home, a group home, a residential treatment center, or a Type 2 residential care center for children and youth, see [Wis. Stat. § 938.34\(3\)\(a\)](#), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice), (c), (cm), (d), (4d), a finding that the juvenile’s current residence will not safeguard the juvenile’s or community’s welfare because of the serious nature of the juvenile’s delinquent act); the court’s finding as to whether the responsible agency made reasonable efforts to prevent the removal of the child from the home, while ensuring that the child’s health and safety are paramount concerns; and, if a permanency plan has previously been prepared for the child, a finding as to whether the responsible agency had made reasonable efforts to achieve the permanency goal of the permanency plan, including, if appropriate, through an out-of-state placement, [Wis. Stat. §§ 48.355\(2\)\(b\)6., 938.355\(2\)\(b\)6.](#);

## 11.25 [Dispositional Alternatives in Delinquency and JIPS Cases] Supervision

[Page 25: Replaced first Comment in section](#)



**Comment.** As of the date of publication of this update to the *Wisconsin Juvenile Law Handbook*, the deadlines for construction of secured residential care centers for children and youth that were authorized by 2017 Wis. Act 185 have been surpassed. *See also* 2019 Wis. Act 8. Although 2021 Wis. Act 252 has authorized the state to contract additional debt for the purpose of constructing a new Type 1 juvenile correctional facility in Milwaukee County, and the DOC has announced a site selection for that facility, attorneys should be alert to ongoing developments with this construction. Because the state has not met the legislatively set deadlines, attorneys might want to challenge the validity of placement at current Type 1 juvenile correctional facilities at Copper Lake or Lincoln Hills Schools if the placement is not consistent with current Wisconsin law.

An unpublished court of appeals decision has held that placement of a juvenile under the serious juvenile offender program (SJOP) statute was lawful despite that the Type 1 juvenile correctional facilities no longer exist in a legal sense. *See* [Wis. Stat. § 938.34\(4h\)\(b\)](#) (requiring that, before placement in SJOP, court must find “that the only other disposition that is appropriate for the juvenile is placement in a juvenile correctional facility under [[Wis. Stat. § 938.34](#)](4m)”). The court reasoned that because Lincoln Hills and Copper Lake continue to operate as Type 1 juvenile correctional facilities, placements at those facilities remain lawful. *State v. J.A.J. (In the Int. of J.A.J.)*, [No. 2022AP2066](#), [2023 WL 7544852](#) (Wis. Ct. App. Nov. 14, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (review denied).

## 11.26 [Dispositional Alternatives in Delinquency and JIPS Cases] Placement Outside the Home

[Page 26: Replaced first paragraph and accompanying Note in section](#)

The court can order that the juvenile be placed in one of several settings outside the juvenile’s home. For example, the court can order the juvenile placed in the home of a relative or like-kin, [Wis. Stat. § 938.34\(3\)\(a\)](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice); a licensed foster home under [Wis. Stat. § 48.62](#) or licensed group home under [Wis. Stat. § 48.625](#), [Wis. Stat. § 938.34\(3\)\(c\)](#); a “second-chance” group home under [Wis. Stat. § 48.625\(1m\)](#), if the juvenile meets certain criteria, [Wis. Stat. § 938.34\(3\)\(cm\)](#); a home not licensed (if placement runs for less than 30 days), [Wis. Stat. § 938.34\(3\)\(b\)](#); or a residential treatment center operated by a child welfare agency licensed under [Wis. Stat. § 48.60](#), [Wis. Stat. § 938.34\(3\)\(d\)](#).

**Note.** Placement with a parent, relative, or like-kin who has been convicted of the first- or second-degree intentional homicide of the juvenile’s parent is prohibited unless the conviction has been reversed, set aside, or vacated or unless the prohibition is overridden by clear and convincing evidence that such placement is in the best interests of the juvenile. [Wis. Stat. § 938.34\(3\)\(a\)1.](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). Placement in the home of a person who is not required to be licensed cannot be made if the person has been convicted of the first- or second-degree intentional homicide of the juvenile’s parent unless the conviction has been reversed, set aside, or vacated or unless the prohibition is overridden by clear and convincing evidence that such placement is in the best interests of the juvenile. [Wis. Stat. § 938.34\(3\)\(b\)1.](#) The statutes provide similar prohibitions against placement in the home of a relative other than the parent, in the home of like-kin, or in the home of another person if the court finds that the relative or person has been convicted of, has pleaded no contest to, or has had a charge dismissed or amended as a result of a plea agreement for certain specified crimes, such as sexual assault. [Wis. Stat. § 938.34\(3\)\(a\)2.](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice), (b)2.

[Pages 26–27: Amended fifth textual sentence in first paragraph after first Note in section](#)

In addition, the court can order a juvenile placed either in a juvenile detention facility or juvenile portion of a county jail that meets the standards promulgated by the DOC or in a place of nonsecure custody designated by the court. [Wis. Stat. § 938.34\(3\)\(f\)](#). (This disposition is not available in JIPS cases. *See* [Wis. Stat. § 938.345\(1\)\(g\)](#); *see also infra* [§ 11.49](#).) Several conditions must attach to these placements. First, the court can order the placement for any combination of single or consecutive days, but totaling no more than 365 days in a juvenile detention facility under [Wis. Stat. § 938.22\(2\)\(d\)1.](#) and no more than 30 consecutive days in any other juvenile detention facility. [Wis. Stat. § 938.34\(3\)\(f\)1.](#) The placement in another juvenile detention facility includes any placement under [Wis. Stat. § 938.34\(3\)\(a\)–\(e\)](#), which includes the home of a parent, other relative, or like-kin ([Wis. Stat. § 938.34\(3\)\(a\)](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice), the home of a person not required to be licensed ([Wis. Stat. § 938.34\(3\)\(b\)](#)), a foster home or group home ([Wis. Stat. § 938.34\(3\)\(c\)](#)), a group home for custodial parents or expectant mothers ([Wis. Stat. § 938.34\(3\)\(cm\)](#)), a residential treatment center ([Wis. Stat. § 938.34\(3\)\(d\)](#)), and an independent living situation ([Wis. Stat. § 938.34\(3\)\(e\)](#)). The juvenile must receive credit for all time spent in juvenile detention in connection with the course of conduct for which the court imposed detention or nonsecure custody. Second, the order can provide for the juvenile’s release during specified hours to attend school or work or to attend or participate in any activity that the court considers beneficial to the juvenile. [Wis. Stat. § 938.34\(3\)\(f\)2.](#) Third, the court cannot place the juvenile in a juvenile detention facility or in a juvenile portion of a county jail unless the county board of supervisors has authorized the use of this type of placement as a disposition. [Wis. Stat. § 938.34\(3\)\(f\)3.](#)

[Page 28: Amended Wis. Stat. citation for carjacking in second sentence in Note before paragraph 3. in numbered list](#)

**Note.** The conditions listed in [Wis. Stat. § 938.34\(4m\)\(b\)](#) provide prima facie evidence that the juvenile is a danger to the public. Under [Wis. Stat. § 938.34\(4m\)\(b\)1.](#), any violation of [Wis. Stat. § 940.01](#) (first-degree intentional homicide), [940.02](#) (first-degree reckless homicide), [940.03](#) (felony murder), [940.05](#) (second-degree intentional homicide), [940.19\(2\)–\(6\)](#) (felony battery), [940.198](#) (elder abuse), [940.21](#) (mayhem), [940.225\(1\)](#) (first-degree sexual assault), [940.31](#) (kidnapping), [941.20\(3\)](#) (endangering safety by use of a dangerous weapon by intentionally discharging firearm from a vehicle), [943.02\(1\)](#) (arson of a building), [943.231\(1\)](#) (carjacking), [943.32\(2\)](#) (armed robbery), [947.013\(1t\)](#), [\(1v\)](#), or [\(1x\)](#) (harassment), [948.02\(1\)](#) or [\(2\)](#) (sexual assault of a child), [948.025](#) (repeated sexual assault of a child), [948.03](#) (physical abuse of a child), or [948.085\(2\)](#) (sexual assault of a child placed in substitute care), that would be a felony if committed by an adult, is prima facie evidence of dangerousness. Under [Wis. Stat. § 938.34\(4m\)\(b\)2.](#), a juvenile's possession or use of, or threat to use a handgun (as defined in [Wis. Stat. § 175.35\(1\)\(b\)](#)), a short-barreled rifle (as defined in [Wis. Stat. § 941.28\(1\)\(b\)](#)), or a short-barreled shotgun (as defined in [Wis. Stat. § 941.28\(1\)\(c\)](#)) while committing a delinquent act that would be a felony if committed by an adult, is prima facie evidence of dangerousness. Under [Wis. Stat. § 938.34\(4m\)\(b\)3.](#), if the juvenile has possessed or gone armed with a short-barreled rifle, a short-barreled shotgun, or a handgun in violation of [Wis. Stat. § 941.28](#) or [Wis. Stat. § 948.60](#), the court must treat those facts as prima facie evidence of dangerousness.

[Page 29: Added second paragraph to last Comment in section](#)

An unpublished court of appeals decision has held that a youth placement under the SJOP statute was lawful despite that the Type 1 juvenile correctional facilities no longer exist in a legal sense. The court reasoned that because Lincoln Hills and Copper Lake continue to operate as Type 1 juvenile correctional facilities, placements at those facilities remain lawful. Although this case was unpublished, courts might rely on a similar reasoning to continue placements at Type 1 juvenile correctional facilities. *State v. J.A.J. (In the Int. of J.A.J.)*, [No. 2022AP2066](#), [2023 WL 7544852](#) (Wis. Ct. App. Nov. 14, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (review denied).

## 11.41 [Dispositional Alternatives in Delinquency and JIPS Cases] Serious Juvenile Offender Program

[Page 37: Amended Wis. Stat. citation for carjacking in paragraph 1.a. in first numbered list in section](#)

- a. Fourteen years old or older and has been adjudicated delinquent for committing or conspiring to commit a violation or attempt of a crime for which the penalty is life imprisonment, [Wis. Stat. § 939.32\(1\)\(a\)](#), felony murder, [Wis. Stat. § 940.03](#), second-degree reckless homicide, *see* [Wis. Stat. § 940.06](#), mayhem, [Wis. Stat. § 940.21](#), first-degree sexual assault, [Wis. Stat. § 940.225\(1\)](#), hostage-taking, [Wis. Stat. § 940.305](#), kidnapping, [Wis. Stat. § 940.31](#), tampering with household products causing the death of another, [Wis. Stat. § 941.327\(2\)\(b\)4.](#), arson of a building, [Wis. Stat. § 943.02](#), Class E burglary, [Wis. Stat. § 943.10\(2\)](#), carjacking, [Wis. Stat. § 943.231\(1\)](#), armed robbery, [Wis. Stat. § 943.32\(2\)](#), first-degree sexual assault of a child, [Wis. Stat. § 948.02\(1\)](#), repeated sexual assault of a child, [Wis. Stat. § 948.025\(1\)](#), child abduction, [Wis. Stat. § 948.30\(2\)](#), or attempted armed robbery, [Wis. Stat. § 943.32\(2\)](#); or

[Page 37: Read in conjunction with paragraph 2. in first numbered list in section](#)

See the discussion of *State v. J.A.J. (In the Interest of J.A.J.)*, [No. 2022AP2066](#), [2023 WL 7544852](#) (Wis. Ct. App. Nov. 14, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (review denied), in Supplement sections 11.25 and 11.26.

## 11.45 [Dispositional Alternatives in Delinquency and JIPS Cases] Sex-Offender Registration

[Page 40: Replaced second paragraph before Note in section](#)

A juvenile adjudicated delinquent for specified sex offenses must register as a sex offender, unless the court determines that the juvenile is not required to report. [Wis. Stat. § 938.34\(15m\)\(bm\)](#). The court makes this determination after a hearing on a motion made by the juvenile. *Id.* Sex offenses under [Wis. Stat. § 938.34\(15m\)\(bm\)](#) include those contained in [Wis. Stat. §§ 940.22\(2\)](#) (sexual contact by therapist), [940.225\(1\)](#), [\(2\)](#), or [\(3\)](#) (first-, second-, or third-degree sexual assault), [944.06](#) (incest), [948.02\(1\)](#) or [\(2\)](#) (first- or second-degree sexual assault of child), [948.025](#) (repeated sexual assault of child), [948.05](#) (sexual exploitation of child), [948.051](#) (child trafficking), [948.055](#) (causing child to view or listen to sexual activity), [948.06](#) (incest with child), [948.07](#) (child enticement), [948.075](#) (computer use to facilitate child sex crime), [948.08](#) (soliciting child for prostitution), [948.085](#) (sexual assault of a child placed in substitute care), [948.095](#) (sexual assault of student by school staff or by person who works or volunteers with children), [948.11\(2\)\(a\)](#) or [\(am\)](#) (Class I exposure of child to harmful material or harmful descriptions or narrations), [948.12](#) (possession of child pornography), [948.125](#) (possession of virtual child pornography), [948.13](#) (child sex offender working with children), and [948.30](#) (abduction of another's child), as well as [Wis. Stat.](#)

§ 940.302(2) (human trafficking) if [Wis. Stat. § 940.302\(2\)\(a\)1.b.](#) (trafficking for purposes of commercial sex act) applies, and [Wis. Stat. §§ 940.30](#) (false imprisonment) and [940.31](#) (kidnapping) if the victim was a minor and the juvenile was not the victim's parent.

## 11.52 [CHIPS and UCHIPS Cases] Dispositional Alternatives in CHIPS Cases and UCHIPS Cases Involving Child Expectant Mother

[Page 43: Replaced second paragraph in section](#)

The judge can order supervision. [Wis. Stat. § 48.345\(2\)](#), (2m); *see also supra* § [11.25](#). The court can order some out-of-home placements: in the home of a relative or like-kin of the child, in a home that need not be licensed if placement lasts for less than 30 days, in a licensed foster home or group home, in the home of a guardian under [Wis. Stat. § 48.977\(2\)](#), in a second-chance group home under [Wis. Stat. § 48.625\(1m\)](#), or in a residential treatment center. [Wis. Stat. § 48.345\(3\)](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). Placement with a parent, guardian, relative, like-kin, or other person who has been convicted of first- or second-degree intentional homicide of the child's parent is prohibited unless the conviction has been reversed, set aside, or vacated or unless the prohibition is overridden by clear and convincing evidence that such placement is in the best interests of the child. [Wis. Stat. § 48.345\(3\)\(a\)1.](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice), (b)1. The statutes provide similar prohibitions against placement in the home of a relative other than the parent, in the home of like-kin, or in the home of another person if the judge finds that the relative or person has been convicted of, has pleaded no contest to, or has had a charge dismissed or amended as a result of a plea agreement for certain specified crimes, such as sexual assault. [Wis. Stat. § 48.345\(3\)\(a\)2.](#), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice), (b)2.

## 11.62 Standard Juvenile Court Forms

[Page 58: Amended Name of Form and Purpose descriptions for Forms JD-1758, JD-1760, and JD-1761 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose  |
|-------------|---------------------------|--|--|
| JD-1758     | Ch. 938                   | Notice of intent to enter civil judgment for restitution, forfeiture, or surcharge | Notice to the juvenile and the parent(s) of the intent of the court to issue an order for judgment for unpaid restitution, forfeiture, or surcharge amounts  |
| JD-1760     | Ch. 938                   | Petition for judgment against juvenile/parent for unpaid forfeiture/surcharge      | Request by representative of public interest, supervising agency, or law enforcement agency that issued citation to juvenile to have a forfeiture or surcharge converted into a judgment that can be docketed against the juvenile and parent(s) |
| JD-1761     | Ch. 938                   | Judgment for unpaid restitution/forfeiture/surcharge                               | Court order granting a judgment for restitution, forfeiture, or surcharge  |

# Chapter 11

## Dispositional Hearing

### I. [Scope of Chapter](#)

#### [§ 11.1]

This chapter discusses dispositional hearings in proceedings involving a child in need of protection or services (CHIPS), an unborn child in need of protection or services (UCHIPS), a juvenile in need of protection or services (JIPS), or delinquency, after a child has been



adjudicated delinquent or found to be in need of protection or services or an unborn child has been found to be in need of protection or services. The Wisconsin Children's Code ([Wis. Stat. ch. 48](#)) and the Wisconsin Juvenile Justice Code ([Wis. Stat. ch. 938](#)) embody a philosophy of rehabilitation and treatment. Even though a dispositional order is “not for the purpose of penalty or punishment,” *State v. B.S. (In the Int. of B.S.)*, 162 Wis. 2d 378, 392, 469 N.W.2d 860 (Ct. App. 1991), traditional concepts of “crime and punishment” were evident in delinquency cases under the former Children's Code, *Winburn v. State*, 32 Wis. 2d 152, 163, 145 N.W.2d 178 (1966). Under the Juvenile Justice Code, provisions relating to disposition reflect a growing tendency to take a “get tough” approach to children who commit crimes. Although rehabilitation is a key goal, personal accountability and community protection are equally important objectives.<sup>1</sup>

This chapter discusses procedure in dispositional hearings, dispositional alternatives, and the role of defense counsel. This chapter does not cover dispositions in civil-law or municipal-ordinance violations. See [Wis. Stat. §§ 938.343, 938.344](#). Also, this chapter does not examine dispositions under the private guardianship statute, [Wis. Stat. § 48.9795](#).

## II. Judicial Exercise of Discretion [§ 11.2]

Both the Children's Code and the Juvenile Justice Code articulate specific dispositions available to the court in CHIPS, UCHIPS, JIPS, and delinquency cases. Crafting an appropriate disposition—one that will be in the child's or unborn child's best interest—requires the exercise of judicial discretion. The disposition of a child's case lies within the sound discretion of the court. The court's disposition is presumed reasonable. The exercise of discretion requires the application of relevant law to the facts to reach a rational conclusion. *State v. James P. (In the Int. of James P.)*, 180 Wis. 2d 677, 510 N.W.2d 730 (Ct. App. 1993).

Under [Wis. Stat. ch. 48](#), CHIPS and UCHIPS dispositional orders must “maintain and protect the well-being of the child or unborn child” and provide for “care, treatment, or rehabilitation of the child and the family, of the child expectant mother, ... the adult expectant mother and the unborn child, consistent with the protection of the public.” [Wis. Stat. § 48.355\(1\)](#). At the same time, disposition must provide for the “least restrictive” alternative to achieve these ends. *Id.*; cf. [Wis. Stat. § 938.355\(1\)](#) (“less restrictive alternative” than juvenile corrections or secured residential care center for children and youth “not appropriate” if juvenile court makes findings as to existence of certain conditions). The best interests of the child or unborn child remain paramount in CHIPS and UCHIPS cases. [Wis. Stat. § 48.01\(1\)](#). Also, reasonable efforts must be made to place siblings together and to provide frequent visitation for siblings who are not placed together. See, e.g., [Wis. Stat. §§ 48.33\(4\)\(d\), 48.355\(2\)\(b\)6p](#). This requirement also applies under [Wis. Stat. ch. 938](#). See, e.g., [Wis. Stat. §§ 938.33\(4\)\(d\), 938.355\(2\)\(b\)6p.](#); see also *infra* § [11.10](#).

Dispositional orders under [Wis. Stat. ch. 938](#) must “promote the objectives under [[Wis. Stat. §](#)] 938.01.” [Wis. Stat. § 938.355\(1\)](#). The objectives specified in [Wis. Stat. § 938.01](#) are as follows:

1. To protect citizens from juvenile crime;
2. To hold juvenile offenders directly accountable for their acts;
3. To provide individualized assessment, in order to prevent further delinquent behavior and to enable the juvenile to live productively and responsibly;
4. To provide due process;
5. To divert juveniles from the juvenile justice system through early intervention, when appropriate and consistent with protection of the public;
6. To respond to a juvenile offender's need for care and treatment, consistent with prevention of delinquency, the juvenile's best interests, and the protection of the public, by allowing the court to choose the most effective disposition; and
7. To ensure that the victims and witnesses of juvenile crime are afforded their rights and treated with dignity.

The legislature deliberately omitted the term *least restrictive alternative* in the standards for imposing a particular disposition under the Juvenile Justice Code. The concept nevertheless assumes constitutional stature whenever a disposition threatens an individual's physical freedom—as in probation revocation proceedings, sentencing proceedings, and even nonpunitive proceedings such as mental commitments. For example, when a court considers removing a juvenile from the parent's custody, counsel should consider arguing that the court should do that only when the court cannot find a less drastic alternative. In CHIPS and UCHIPS cases, the statute mandates a policy of transferring custody from the parent or of placing an expectant mother outside her home only when there is no less drastic alternative. When a transfer of custody does occur, the judge must consider transferring custody to a relative whenever possible. See [Wis. Stat. § 48.355\(1\)](#).

Under both the Children's Code and the Juvenile Justice Code, the court can exercise discretion only as to the dispositions enumerated in the statutes and within the guidelines carefully drawn by the legislature. *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974). A court cannot impose any disposition unless a statute specifically authorizes it. *Id.*; see also *Breier v. E.C. (In the Int. of E.C.)*, 130 Wis. 2d 376, 390, 387 N.W.2d 72 (1986).

**Caution.** The legislature has imposed additional requirements on dispositions involving Indian juveniles. See generally [Wis. Stat.](#) §§ 48.028, 48.31, 48.345, 938.028, 938.31, 938.345. See also [Wis. Stat.](#) §§ 48.01(2), 938.01(3) (declaring policy regarding Indian child welfare).

The juvenile court's power to impose dispositions varies depending on whether the case is heard by a court commissioner or a judge. A court commissioner can make dispositions only in uncontested CHIPS, UCHIPS, JIPS, and delinquency proceedings; even then, the disposition cannot include commitment of a delinquent juvenile to a Type 2 residential care center for children and youth under [Wis. Stat.](#) § 938.34(4d), to a juvenile correctional facility or secured residential care center for children and youth under [Wis. Stat.](#) § 938.34(4m), or to the serious juvenile offender program. [Wis. Stat.](#) § 757.69(1)(g)5., (1m)(g). Other limitations on the court's discretion depend on the nature of the proceedings. [Wis. Stat.](#) §§ 48.345, 48.347, 938.34, 938.342, and 938.345 list the alternatives available to the court at disposition in CHIPS, UCHIPS, delinquency, truancy ordinance violation, and JIPS cases. (Presumably, "court" includes both "judge" and "court commissioner," because [Wis. Stat.](#) chs. 48 and 938 each contain a separate definition for "judge." See [Wis. Stat.](#) §§ 48.02(10), 938.02(10). Moreover, circuit court commissioners can perform the same duties as judges in cases under [Wis. Stat.](#) chs. 48 and 938, subject to certain limitations. See [Wis. Stat.](#) § 757.69.) [Wis. Stat.](#) §§ 938.343 and 938.344 list the dispositions available to the court in cases involving violations of civil laws, ordinance violations, and alcohol-or drug-related violations.

### III. Procedure [§ 11.3]

#### A. In General [§ 11.4]

The statutes impose the same basic procedural requirements for dispositional hearings in CHIPS, UCHIPS, JIPS, and delinquency cases.

#### B. Notice [§ 11.5]

After the filing of a CHIPS or delinquency petition, the court must notify the child and the parent, guardian, or legal custodian, as well as any foster parent or other physical custodian. [Wis. Stat.](#) §§ 48.27(3), 938.27(3). For CHIPS and JIPS petitions under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) that involve an Indian child who has been removed from the home, notice must also be given to the Indian custodian and the tribe, and the Indian custodian and the tribe may intervene at any time. [Wis. Stat.](#) §§ 48.27(3)(d), 938.27(3)(d). The court must make every reasonable effort to identify and notify any person who has filed a declaration of paternal interest, any person conclusively determined from genetic tests results to be the child's father under [Wis. Stat.](#) § 767.804, any person who has acknowledged paternity of the child under [Wis. Stat.](#) § 767.805(1), and any person already adjudged the father of the child in a judicial proceeding (unless his rights have been terminated). [Wis. Stat.](#) §§ 48.27(5), 938.27(5). [Wis. Stat.](#) § 48.025 allows any person asserting his paternity of a nonmarital child who is not adopted or whose parents do not later marry each other, and whose paternity has not been established, to file a declaration of interest in matters affecting the child.

After a UCHIPS petition is filed, the court must notify the unborn child's guardian ad litem (if applicable) and the expectant mother. [Wis. Stat.](#) § 48.27(3)(a)1. If the expectant mother is a child, the court must also notify her parent, guardian, or legal custodian, as well as any foster parent or other physical custodian. *Id.* If the expectant mother is an adult, the court must also notify her physical custodian, if any. [Wis. Stat.](#) § 48.27(3)(c). If the UCHIPS case involves an Indian child who has been removed from the home of his or her parent or Indian custodian or if it involves an unborn child who will be an Indian child, the court must notify the Indian child's Indian custodian and tribe or the Indian tribe with which the unborn child may be eligible for affiliation when born. [Wis. Stat.](#) § 48.27(3)(d).

The first notice to any interested party must be in writing and may have the petition attached. [Wis. Stat.](#) §§ 48.27(3)(a)1., 938.27(3)(a)1. The first notice to a court-appointed special advocate (CASA) in a CHIPS case must also be in writing and must have the petition attached. [Wis. Stat.](#) § 48.27(3)(e). Subsequent notice, including notice of the dispositional hearing, can be given by telephone at least 72 hours before the time of the hearing. [Wis. Stat.](#) §§ 48.27(3)(a)1., 938.27(3)(a)1. Obviously, if the judge sets a date for the dispositional hearing in court, those parties present have actual notice of the hearing date and need not receive additional notice. A person giving notice by telephone must place a signed statement in the case file indicating the time of giving notice and the person to whom he or she spoke. [Wis. Stat.](#) §§ 48.27(3)(a)1., 938.27(3)(a)1.

In CHIPS cases, UCHIPS cases involving a child expectant mother, delinquency cases, and JIPS cases, the notice must contain the child's name and the nature, location, date, and time of the hearing. [Wis. Stat.](#) §§ 48.27(4)(a)1., 938.27(4)(a). The notice must also advise the child, and any party, if applicable, of the applicable right to counsel regardless of ability to pay. [Wis. Stat.](#) §§ 48.27(4)(a)2., 938.27(4)(b).

In UCHIPS cases involving an adult expectant mother, the notice must contain the name of the adult expectant mother and the nature, location, date, and time of the hearing. [Wis. Stat.](#) § 48.27(4)(b)1. The notice must also advise the adult expectant mother of her right to legal counsel regardless of her ability to pay. [Wis. Stat.](#) § 48.27(4)(b)2.

Notice can be served by mail, subject to certain statutory exceptions. [Wis. Stat.](#) §§ 48.273(1)(a), 938.273(1)(a). If those who receive notice by mail fail to appear or otherwise to acknowledge service, the court generally must grant a continuance. [Wis. Stat.](#) §§ 48.273(1)(ar), 938.273(1)(ar). Service must then be made personally, unless the court deems it impracticable, in which case the court can order service by certified mail to the last-known addresses of the individuals. [Wis. Stat.](#) §§ 48.273(1)(ar), 938.273(1)(ar). The court may refuse to grant a continuance, however, if the child is being held in secure custody. Under such circumstances, the court must order that service of notice of the next hearing be made personally or by certified mail to the person's last-known address. [Wis. Stat.](#) §§ 48.273(1)(b), 938.273(1)(b). Also, in CHIPS, UCHIPS, and nondelinquency JIPS cases that involve an Indian child placed outside the home of his or her parent or Indian custodian, notice must be given to the Indian child's parent, Indian custodian, or tribe, as provided in [Wis. Stat.](#) § 48.028(4)(a) or [Wis. Stat.](#) § 938.028(4)(a). [Wis. Stat.](#) §§ 48.273(1)(ag), 938.273(1)(ag). The state can obtain personal jurisdiction over members of the Menominee Indian Tribe. *M.L.S. v. State (In the Int. of M.L.S.)*, 157 Wis. 2d 26, 31, 458 N.W.2d 541 (Ct. App. 1990).

Notice by mail generally must be sent at least seven days before the hearing. [Wis. Stat.](#) §§ 48.273(1)(c), 938.273(1)(c). For notice by mail of CHIPS and JIPS hearings in which the person to receive notice lives outside the state, notice must be sent at least 14 days before the hearing. [Wis. Stat.](#) §§ 48.273(1)(c)1., 938.273(1)(c)1. (In CHIPS, UCHIPS, and nondelinquency JIPS cases that involve the out-of-home placement of an Indian child, service by mail must be sent so that it is received by the person to be notified at least 10 days before the hearing or, if the identity or location of the person to be notified cannot be determined, by the U.S. Secretary of the Interior at least 15 days before the hearing. [Wis. Stat.](#) §§ 48.273(1)(c)2., 938.273(1)(c)2.) Personal service must occur at least 72 hours before the time of the hearing. [Wis. Stat.](#) §§ 48.273(1)(c), 938.273(1)(c). An unpublished court of appeals decision has held that the court cannot reduce the 72-hour period for giving notice. *W.W.C. v. State (In the Int. of D.L.C.)*, Nos. 90-2741-FT, 90-2742-FT, 1991 WL 101333 (Wis. Ct. App. Apr. 25, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

In addition to serving notice, the court can issue a summons requiring the person who has legal custody of the child or child expectant mother to appear personally and, if the court orders, to bring the child or child expectant mother before the court at the time and place stated in the notice. [Wis. Stat.](#) §§ 48.27(1)(a), 938.27(1). In a UCHIPS case involving an adult expectant mother, the court can issue a summons requiring the expectant mother to appear personally before the court at the time and place stated. [Wis. Stat.](#) § 48.27(1)(b). The court can also issue a summons requiring the appearance of any other person whose presence the court deems necessary. [Wis. Stat.](#) §§ 48.27(2), 938.27(2).

Any person who has been summoned to appear and who fails to do so without reasonable cause can be prosecuted for contempt of court. [Wis. Stat.](#) §§ 48.28, 938.28. The court can issue a *capias* for the parent or guardian or for the child if the summons cannot be served, if the parties served fail to obey the summons, or when the court concludes that service will prove ineffectual. [Wis. Stat.](#) §§ 48.28, 938.28.

### C. Time Periods [§ 11.6]

If all parties consent, the court can proceed directly to disposition after adjudication. [Wis. Stat.](#) §§ 48.30(6), 48.31(7), 938.30(6), 938.31(7). Otherwise, dispositional hearings must take place not more than 10 days after the fact-finding hearing for a child in secure custody and not more than 30 days for a child or expectant mother not held in secure custody. [Wis. Stat.](#) §§ 48.31(7), 938.31(7). See [chapter 5](#), *supra*, for a discussion of secure custody under the Children's Code and the Juvenile Justice Code.

Under both [Wis. Stat.](#) chs. 48 and 938, "[f]ailure ... to act within any time period ... does not deprive the court of personal or subject-matter jurisdiction or of competency to exercise that jurisdiction." [Wis. Stat.](#) §§ 48.315(3), 938.315(3). Furthermore, failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). If the court or a party fails to act within an applicable statutory time period, the court may order any of the following: dismissal without prejudice, release of the child from secure or nonsecure custody or from the terms of a custody order, and any other relief that the court considers appropriate. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In addition, in [Wis. Stat.](#) ch. 938 cases, courts may dismiss a petition *with* prejudice. [Wis. Stat.](#) § 938.315(3). This remedy is not available under [Wis. Stat.](#) ch. 48. See [Wis. Stat.](#) § 48.315(3); see also 2007 Wis. Act 199.

**Practice Tip.** Defense counsel should remember to object, at the earliest opportunity, to any failure to act within a statutory time period.

Certain periods can be excluded (i.e., tolled) when computing time requirements. The court can grant these continuances only for good cause shown on the record before the expiration of the time period in question. [Wis. Stat.](#) §§ 48.315(2), 938.315(2); *M.G. v. La Crosse Cnty. Hum. Servs. Dep't (In the Int. of G.H.)*, 150 Wis. 2d 407, 441 N.W.2d 227 (1989); *J.R. v. State (In re J.R.)*, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989); *T.H. v. La Crosse Cnty. (In the Int. of R.H.)*, 147 Wis. 2d 22, 39, 433 N.W.2d 16 (Ct. App. 1988). The term “continuance” under [Wis. Stat.](#) § 48.315(2) is broad enough to include scheduling the fact-finding hearing beyond the 45-day time period under [Wis. Stat.](#) § 48.422(2) in a termination of parental rights case. *State v. Robert K. (In re Termination of Parental Rts. to Moriah K.)*, 2005 WI 152, ¶ 28, 286 Wis. 2d 143, 706 N.W.2d 257. Courts’ calendars and lawyers’ scheduling conflicts may constitute good cause under [Wis. Stat.](#) § 48.315(2), and no magic words or special utterances are needed to demonstrate good cause on the record in open court as long as good cause is apparent from the record. *Id.* ¶¶ 33–54.

As to what constitutes good cause, [Wis. Stat.](#) §§ 48.315(1) and 938.315(1) list the periods excluded when computing statutory deadlines:

1. Any period of delay resulting from other actions concerning the child or the unborn child and the unborn child’s expectant mother is excluded in computing time periods. [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1. This includes delay resulting from psychological evaluations, *Shawn B.N. v. State (In the Int. of Shawn B.N.)*, 173 Wis. 2d 343, 497 N.W.2d 141 (Ct. App. 1992); hearings related to the mental condition of the child, the child’s parent, guardian, or legal custodian, or the expectant mother, [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.; see, e.g., [Wis. Stat.](#) § 938.30(5); see also *J.R.*, 152 Wis. 2d at 606; prehearing motions, [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.; waiver motions, [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.; and hearings on other matters, [Wis. Stat.](#) §§ 48.315(1)(a), 938.315(1)(a)1.

**Note.** [Wis. Stat.](#) §§ 48.295 and 938.295 govern psychological evaluations. If the court adjourns the dispositional hearing for a psychological evaluation, the time periods should toll from the date the court orders the evaluation until the date the expert completes the evaluation, *not* until the date the parties review the evaluations or the expert is ready to testify. If the parties need an additional continuance to prepare for disposition in light of the psychological evaluation, they should request it, and the court should determine whether good cause exists for continuing the case. For a discussion of how a waiver hearing affects the time periods for holding the plea hearing, see [chapter 8](#), *supra*.

2. Any period of delay resulting from a continuance granted at the request of or with the consent of the child and counsel or of the unborn child’s guardian ad litem is excluded. [Wis. Stat.](#) §§ 48.315(1)(b), 938.315(1)(a)2.

**Comment.** The plain language of the statutes mandates that the child personally agree to the continuance. The child’s silence when the court sets a date beyond the time periods does not constitute consent. See *R.H.*, 147 Wis. 2d at 38–39.

3. Any period of delay caused by the disqualification of a judge, [Wis. Stat.](#) §§ 48.315(1)(c), 938.315(1)(a)3., or by a juvenile’s request for substitution of judge, is excluded. [Wis. Stat.](#) § 938.315(1)(a)3.; see also *State v. Joshua M.W. (In the Int. of Joshua M.W.)*, 179 Wis. 2d 335, 507 N.W.2d 141 (Ct. App. 1993); *Shawn B.N. v. State (In the Int. of Shawn B.N.)*, 173 Wis. 2d 343, 497 N.W.2d 141 (Ct. App. 1992). Under [Wis. Stat.](#) ch. 938 only, any period of delay caused by “any other transfer of the case or intake inquiry to a different judge, intake worker or county” is also excluded. [Wis. Stat.](#) § 938.315(1)(a)3.

4. Any period of delay resulting from a continuance granted at the request of the prosecutor is excluded, but only if

- a. The prosecutor has exercised due diligence to obtain material evidence that has been unavailable, if reasonable grounds exist to believe that the evidence will be available at a later date; or
- b. The prosecutor needs additional time to prepare the case, and the exceptional circumstances of the case justify the additional time. [Wis. Stat.](#) §§ 48.315(1)(d), 938.315(1)(a)4.

**Comment.** The prosecutor can request a continuance on these grounds only. The prosecutor must demonstrate that the evidence (or witness) remains unavailable after the prosecutor exercised due diligence to obtain it. The prosecutor must also demonstrate the materiality of the evidence. Although the statute does not define *due diligence*, diligent attempts to procure the attendance of a witness are a condition, in both civil and criminal cases, to invoking the concept of unavailability under the Wisconsin Rules of Evidence. *La Barge v. State*, 74 Wis. 2d 327, 336, 246 N.W.2d 794 (1976). Therefore, examination of the case law defining *due diligence* under the Evidence Code might prove instructive. (Both the hearsay statute and [Wis. Stat.](#) §§ 48.315(1)(d) and 938.315(1)(a)4. involve the unavailability of witnesses after due diligence to procure their attendance, and statutes relating to the same subject matter must be read together. *Pulaski State Bank v. Kalbe*, 122 Wis. 2d 663, 665, 364 N.W.2d 162 (Ct. App. 1985); see also [Wis. Stat.](#) § 990.01(1) (providing that words and phrases that have a “peculiar meaning in the law shall be construed according to such



meaning”).) For example, under the Wisconsin Rules of Evidence, a witness is not unavailable unless the prosecutor has made a good-faith effort to procure the witness’s attendance at trial. *State v. Zellmer*, 100 Wis. 2d 136, 301 N.W.2d 209 (1981). This requirement compels the prosecutor to state with specificity the efforts the prosecutor made to procure the attendance of the witness.

The court can grant a continuance for further preparation only if the prosecutor demonstrates the “exceptional” circumstances of the case. Assertions by the prosecutor that the workload prevented preparation will not suffice. Something exceptional about the case itself must make adequate preparation impossible in the allotted time. This provision resembles the continuance provision in the “speedy trial” statute, *Wis. Stat.* § 971.10(3)(b)2., which requires that the case be “so unusual and so complex ... that it is unreasonable to expect adequate preparation within the periods of time established by this section.”

5. In *Wis. Stat.* ch. 938 cases, any period of delay resulting from court congestion or scheduling is excluded. *Wis. Stat.* § 938.315(1)(a)5.
6. Any period of delay because of the imposition of a consent decree is excluded. *Wis. Stat.* §§ 48.315(1)(e), 938.315(1)(a)6. *Wis. Stat.* §§ 48.32 and 938.32 govern consent decrees.
7. Any period of delay resulting from the absence or unavailability of the child or expectant mother is excluded. *Wis. Stat.* §§ 48.315(1)(f), 938.315(1)(a)7.

**Comment.** Published decisions have not addressed whether the state’s failure to produce a child held in secure custody for a hearing constitutes absence or unavailability under these provisions. Other circumstances listed under *Wis. Stat.* §§ 48.315(1) and 938.315(1), however, clearly involve conscious, affirmative action taken by the parties, so counsel could argue that the state’s negligence in bringing a child to a hearing cannot constitute good cause under *Wis. Stat.* §§ 48.315 and 938.315. *But see Charleston D. v. State (In the Int. of Charleston D.)*, No. 92-2450-FT, 1993 WL 85379 (Wis. Ct. App. Jan. 26, 1993) (unpublished opinion not citable per *Wis. Stat.* § 809.23(3)). The court’s decision in *Charleston D.* implied a finding that the state, although not acting in bad faith, had not fulfilled its responsibility for ensuring that the child appeared at the hearing.

8. Any period of delay resulting from the inability of the court to provide the child with notice of a hearing to extend the child’s dispositional order is excluded, if the court’s inability resulted from the child having run away or otherwise having made himself or herself unavailable to receive notice. *Wis. Stat.* §§ 48.315(1)(fm), 938.315(1)(a)8.
9. A reasonable period of delay when the child is joined in a hearing with another child and the time period for that child has not expired is excluded, but only if good cause exists for not hearing the cases separately. *Wis. Stat.* §§ 48.315(1)(g), 938.315(1)(g).
10. Any period of delay resulting from the need to appoint a qualified interpreter is excluded. *Wis. Stat.* §§ 48.315(1)(h), 938.315(1)(a)9.
11. In a delinquency case, any period of delay is excluded that results from a consultation between an intake worker or prosecutor with tribal officials, under *Wis. Stat.* § 938.24(2r) or *Wis. Stat.* § 938.25(2g), regarding certain Indian juveniles who are alleged to have committed delinquent acts while outside the tribe’s reservation under a tribal court order. *Wis. Stat.* § 938.315(1)(a)10.
12. In CHIPS cases and JIPS cases under *Wis. Stat.* § 938.13 (4), (6), (6m), or (7), a reasonable period of delay, not to exceed 20 days, in a proceeding involving the out-of-home care placement of a child or termination of parental rights to a child whom the court knows or has reason to know is an Indian child, resulting from a continuance granted at the request of the child’s parent, Indian custodian, or tribe to enable the requester to prepare for the proceeding. *Wis. Stat.* §§ 48.315(1)(j), 938.315(1)(a)11.

The circuit court’s authority to grant a continuance under *Wis. Stat.* §§ 48.315(2) and 938.315(2) is not limited to the specific circumstances articulated in *Wis. Stat.* §§ 48.315(1) and 938.315(1). *M.G.*, 150 Wis. 2d at 418; *J.R.*, 152 Wis. 2d at 607. For example, in an unpublished decision, the court of appeals upheld a juvenile court judge’s decision to adjourn the dispositional hearing beyond the mandatory time limits then in effect so that the judge who presided over the fact-finding hearing could decide disposition. *Erwin D.B. v. State (In the Int. of Erwin D.B.)*, No. 92-2613, 1993 WL 118829 (Wis. Ct. App. Apr. 20, 1993) (unpublished opinion not citable per *Wis. Stat.* § 809.23(3)). On the other hand, in another unpublished decision, the court upheld the juvenile court’s denial of the child’s request for a continuance for a “staffing” to be completed at two residential treatment centers, because the child had already been staffed and rejected for residential treatment at another facility. *Johnny G. v. State (In the Int. of Johnny G.)*, No. 92-1818, 1993 WL 85394 (Wis. Ct. App. Jan. 26, 1993) (unpublished opinion not citable per *Wis. Stat.* § 809.23(3)).

The specific grounds that the statute *does* list, however, can be raised only in the manner provided by the statute, because enumeration of the specific grounds set forth in *Wis. Stat.* §§ 48.315(1) and 938.315(1) indicates a legislative intent to exclude any alternative. *C.A.K. v. State (In the Int. of C.A.K.)*, 154 Wis. 2d 612, 453 N.W.2d 897 (1990). For example, as noted above, the court can grant a continuance

sought by the prosecutor because he or she needs more time to prepare for disposition only if the prosecutor demonstrates that the case involves exceptional circumstances. [Wis. Stat.](#) §§ 48.315(1)(d), 938.315(1)(a)4.

## D. Evidence and Burden of Proof [§ 11.7]

The rules of evidence do not apply at dispositional hearings. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). Any party can, however, present evidence relevant to disposition, including expert testimony. [Wis. Stat.](#) §§ 48.335(3), 938.335(3). For a discussion of other rights of parties at dispositional hearings, see [chapter 2](#), *supra*. The court must “apply the basic principles of relevancy, materiality and probative value” in deciding whether to admit evidence on questions of fact. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). Thus, the court must exclude any irrelevant evidence, [Wis. Stat.](#) § 904.02, evidence more prejudicial than probative, [Wis. Stat.](#) § 904.03, repetitious evidence, *id.*, and evidence otherwise inadmissible under [Wis. Stat.](#) § 901.05 (HIV test results). [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). The court cannot admit hearsay evidence unless it has “demonstrable circumstantial guarantees of trustworthiness.” [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b).

In addition, the juvenile court cannot rely on immunized testimony to order a child committed to a juvenile correctional facility. [State v. J.H.S.](#), 90 Wis. 2d 613, 618, 280 N.W.2d 356 (Ct. App. 1979) (holding that dispositional hearing was “tainted” by reliance on immunized testimony in violation of child’s Fifth Amendment privilege against self-incrimination).

Generally, neither the Children’s Code nor the Juvenile Justice Code articulates the prosecutor’s burden of proof at disposition, although specific burdens apply in cases of children subject to the Indian Child Welfare Act (ICWA). *See, e.g.*, [Wis. Stat.](#) §§ 48.355(2)(b)6v., 938.355(2)(b)6v. (requiring certain findings to be supported by clear and convincing evidence when an order removes an Indian child from the home of a parent or Indian custodian). However, the court of appeals has held that in CHIPS cases, the disposition ordered must have the support of the greater weight of the credible evidence. [S.D.S. v. Rock Cnty. Dep’t of Soc. Servs. \(In the Int. of T.M.S.\)](#), 152 Wis. 2d 345, 357, 448 N.W.2d 282 (Ct. App. 1989). The holding in *T.M.S.* presumably also applies to UCHIPS dispositional hearings.

**Comment.** This holding applies only to CHIPS dispositional hearings and rests on the essentially civil nature of CHIPS cases and on the lower burden of proof applicable to CHIPS cases at the adjudicatory stage. *Id.* at 356–57 n.9. Although the lower burden of proof has applied even at criminal sentencing hearings in federal court, *see United States v. Lee*, 818 F.2d 1052 (2d Cir. 1987), (adopting preponderance-of-the-evidence standard for fact-finding at federal sentencing), the U.S. Supreme Court has since held that a preponderance-of-the-evidence standard for proving a fact that would require a mandatory minimum sentence violates a defendant’s right to due process and right to a jury trial. *United States v. Haymond*, 139 S. Ct. 2369 (2019).

## E. Court Reports [§ 11.8]

### 1. What Is a Court Report [§ 11.9]

A court-designated agency (usually the county department of health and social services) must prepare a court report before disposition in CHIPS, UCHIPS, JIPS, and delinquency cases. [Wis. Stat.](#) §§ 48.33(1), 938.33(1). Similar to a presentence investigation report in a criminal case, *see Wis. Stat.* § 972.15, the court report contains relevant information to assist the judge at disposition. However, although the court has discretion in deciding whether to order a presentence report in a criminal case, the court must order a report in CHIPS, UCHIPS, JIPS, and delinquency cases.

Under [Wis. Stat.](#) §§ 48.33 and 938.33, the court report must contain the following:

1. The social history of the child or the expectant mother of the unborn child, [Wis. Stat.](#) §§ 48.33(1)(a), 938.33(1)(a);
2. A recommended plan of rehabilitation or treatment and care based on the agency’s investigation and on any court-ordered psychological evaluation or assessment, [Wis. Stat.](#) §§ 48.33(1)(b), 938.33(1)(b);

**Note.** In CHIPS and UCHIPS cases, the plan must contain the “least restrictive means available” to accomplish the plan. [Wis. Stat.](#) § 48.33(1)(b). In JIPS and delinquency cases, the plan must contain the “most effective means available” to accomplish the plan. [Wis. Stat.](#) § 938.33(1)(b). Whenever an individual’s freedom is at risk, the court must consider the least restrictive alternative. *See supra* § 11.2. In cases of child abuse and neglect or unborn child abuse, the plan must include both an assessment of the risks to the child’s or unborn child’s safety and physical health and a description of a plan to control the risks. [Wis. Stat.](#) § 48.33(1)(b).

3. The agency’s recommendation of specific services that the court can order for the family and child or for the expectant mother of the unborn child, as well as the entities with primary responsibility for providing those services, [Wis. Stat.](#) §§ 48.33(1)(c), 938.33(1)(c);

**Note.** The report must name the person or agency responsible for case management or coordination of services, “if any.” The report must also advise whether the child should receive a coordinated services plan of care. [Wis. Stat.](#) §§ 48.33(1)(c), 938.33(1)(c). Under [Wis. Stat.](#) § 48.02(2f) and 938.02(2f), *coordinated services plan of care* has the meaning given in [Wis. Stat.](#) § 46.56(1)(cm): “a plan under sub. (8)(h) [of [Wis. Stat.](#) § 46.56] for a child who is involved in 2 or more systems of care and his or her family.” See also [Wis. Stat.](#) § 46.56(8)(h) (describing contents of coordinated services plan of care).

4. A statement of the objectives of the plan, including any desired behavioral changes and the academic, social, and vocational skills the child or expectant mother needs, [Wis. Stat.](#) §§ 48.33(1)(d), 938.33(1)(d);
5. A plan for educational services the child will receive, [Wis. Stat.](#) §§ 48.33(1)(e), 938.33(1)(e); and

**Note.** The plan should be developed after consultation with staff at the school currently or last attended by the child.

6. If the agency recommends that the court order the child’s parent, guardian, or legal custodian or the expectant mother to participate in mental health treatment, anger management, counseling, or parent or prenatal development training and education, a statement as to the availability and funding of those services, [Wis. Stat.](#) §§ 48.33(1)(f), 938.33(1)(f).

## 2. [When the Report Must Be in Writing](#)

### [§ 11.10]

Whether the agency must present a written court report depends on its recommendation regarding placement. Under either [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938, if the report recommends that the child or expectant mother remain at home, the agency can present an oral report at the dispositional hearing, but only if all parties consent. [Wis. Stat.](#) §§ 48.33(2), 938.33(2).

Under both [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938, the agency must submit a written report if the report recommends placing the child in a foster home, a group home, a residential care center for children and youth, the home of a relative other than a parent, the home of a guardian under [Wis. Stat.](#) § 48.977(2), or a supervised independent living arrangement. Also under [Wis. Stat.](#) ch. 48, the agency must submit a written report if the report recommends placing an adult expectant mother outside her home.

**Note.** If the agency does not have available the name of the foster home by the time the agency files the report, the agency must provide the court and the parent or guardian with the name and address of the foster parent within 21 days after the court enters the dispositional order. The court can order this information withheld from the parent or guardian if the court finds that disclosure would result in imminent danger to the child or foster parent. The court cannot withhold this information without a hearing. [Wis. Stat.](#) §§ 48.33(5), 938.33(5).

Except for cases involving an adult expectant mother, the report must contain a permanency plan and a recommendation of the amount of child support the parent or parents should pay. [Wis. Stat.](#) §§ 48.33(4), 938.33(4). [Wis. Stat.](#) §§ 48.38 and 938.38 govern permanency plans. See *infra* §§ [11.13–15](#). The report must also contain specific information showing the following:

1. Continued placement of the child in his or her home would be contrary to the child’s welfare. [Wis. Stat.](#) §§ 48.33(4)(c), 938.33(4)(c).
2. The responsible agency has made reasonable efforts to prevent the child’s removal from the home, while ensuring that the child’s health and safety are the paramount concerns, unless any of the circumstances in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. apply. [Wis. Stat.](#) §§ 48.33(4)(c), 938.33(4)(c).

**Note.** The circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. include the following: (1) the parent has subjected the child to aggravated circumstances, including abandonment, torture, chronic abuse, or sexual abuse; (2) the parent has committed, has aided or abetted the commission of, or has solicited, conspired, or attempted to commit first-degree intentional homicide, second-degree intentional homicide, first-degree reckless homicide, or felony murder against the parent’s child; (3) the parent has committed certain specified crimes, such as sexual assault, against the child, resulting in great bodily harm or substantial bodily harm against the child or another child of the parent; (4) the parent has committed child trafficking against a victim who was the parent’s child; (5) the parental rights of the parent to another child have been involuntarily terminated; or (6) the parent has been found to have relinquished custody of the child under [Wis. Stat.](#) § 48.195(1) when the child was 72 hours old or younger. See [Wis. Stat.](#) §§ 48.355(2d)(b)1.–5., 938.355(2d)(b)1.–4.



3. If a permanency plan has previously been prepared for the child, the agency has made reasonable efforts to achieve the permanency goal of the child's permanency plan, including, if appropriate, through an out-of-state placement. [Wis. Stat.](#) §§ 48.33(4)(c), 938.33(4)(c).
4. If the child has one or more siblings, the agency responsible has made reasonable efforts to place the child in a placement that enables the sibling group to remain together, unless the report contains specific information showing that (a) joint placement would be contrary to the safety or well-being of the child or any of the siblings; and (b) the agency has made reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and the siblings, unless visitation or interaction would be contrary to the safety or well-being of the child or any of those siblings. [Wis. Stat.](#) §§ 48.33(4)(d), 938.33(4)(d).
5. If the report recommends placement of a child in a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, the report must contain a statement to that effect. [Wis. Stat.](#) §§ 48.33(4)(cm), 938.33(4)(cm). In addition, the report must include the results of the standardized assessment and the recommendation of the qualified individual who conducted the standardized assessment. [Wis. Stat.](#) §§ 48.33(4)(cr); 938.33(4)(cr). The report must include information about the following: whether the proposed placement will provide the child with the most effective and appropriate level of care in the least restrictive environment; how the placement is consistent with the short-term and long-term goals for the child, as specified in the permanency plan; the reasons why the child's needs can or cannot be met by the child's family or in a foster home; and the placement preference of the family permanency team under [Wis. Stat.](#) § 48.38(3m) or 938.38(3m) and, if not the qualified individual's recommended placement, why that recommendation was not preferred. [Wis. Stat.](#) §§ 48.33(4)(cr); 938.33(4)(cr).
6. In CHIPS cases and JIPS cases under [Wis. Stat.](#) § 938.13 (4), (6), (6m), or (7), if the agency knows or has reason to know that the child is an Indian child who is being removed from the home, the agency must provide specific information showing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that active efforts have been made to prevent the breakup of the Indian child's family. [Wis. Stat.](#) §§ 48.33(4)(dm), 938.33(4)(dm); *see also* [Wis. Stat.](#) §§ 48.028(4)(d)1., 2., 938.028(4)(d)1., 2. The report must also include a statement as to whether the placement is in compliance with the order-of-placement preference under [Wis. Stat.](#) § 48.028(7)(b) or (c) or [Wis. Stat.](#) § 938.028(6)(a) or (b) or, if not in compliance, the report must provide specific information showing good cause for departing from that order. [Wis. Stat.](#) §§ 48.33(4)(dm), 938.33(4)(dm).

In JIPS and delinquency cases, the agency can present the report orally if all parties consent. [Wis. Stat.](#) § 938.33(4). If the report is presented orally, it must be transcribed and made a part of the court record. *Id.*

If the report recommends placing a juvenile found delinquent under [Wis. Stat.](#) ch. 938 in a juvenile correctional facility or secured residential care center for children and youth, the agency must present a written report, except that the agency can present an oral report if the juvenile and the juvenile's counsel consent. In addition to the information required by [Wis. Stat.](#) § 938.33 (as noted above), the report must contain a description of any available less restrictive dispositions the agency considered and the agency's explanation as to their inappropriateness for the juvenile. [Wis. Stat.](#) § 938.33(3)(a). The report must also contain a recommendation of the amount of child support the parent or parents should pay. [Wis. Stat.](#) § 938.33(3)(b), (4m).

### 3. Notice [§ 11.11]

The statutes specifically governing court reports do not set a deadline for their submission. But under the discovery provisions in [Wis. Stat.](#) chs. 48 and 938, all records relating to a child (or to an unborn child and the unborn child's expectant mother) that are "relevant to the subject matter of a proceeding" under the Children's Code and the Juvenile Justice Code must be open for inspection by the guardian ad litem or counsel for any party upon demand at least 48 hours before the proceeding. [Wis. Stat.](#) §§ 48.293(2), 938.293(2). (The same discovery provisions also apply to CASAs in CHIPS proceedings. [Wis. Stat.](#) § 48.293(2).) Therefore, the agency must file the court report at least 48 hours before the dispositional hearing. The statutes require presentation of releases "when necessary" (under [Wis. Stat.](#) ch. 48), [Wis. Stat.](#) § 48.293(2), or "where necessary" (under [Wis. Stat.](#) ch. 938) (i.e., when required by statute), [Wis. Stat.](#) § 938.293(2).

**Note.** Counsel should note, however, that consent to proceed directly to disposition after adjudication, *see* [Wis. Stat.](#) §§ 48.30(6), 48.31(7), 938.30(6), 938.31(7), or consent to oral presentation of the court report, *see* [Wis. Stat.](#) § 938.33(4), waives any objection to an inability to inspect the court report within 48 hours of the dispositional hearing.

The court has authority to order counsel, the guardian ad litem, or the CASA not to disclose specific items in the records to the child or parent or to the expectant mother if the court "reasonably believes that the disclosure would be harmful to the interests of the child or the unborn child." [Wis. Stat.](#) § 48.293(2); *see also* [Wis. Stat.](#) § 938.293(2) (permitting court to instruct against disclosure if court reasonably believes that disclosure would be "harmful to the interests of the juvenile").

**Comment.** Some circuit courts take the position that, as a matter of policy in every case, adversary counsel cannot show court reports to their clients. Under [Wis. Stat.](#) §§ 48.293(2) and 938.293(2), however, the court must reasonably believe that, based on the particular facts of a case, disclosure would harm the child or unborn child. In addition, even if the court reasonably holds such a belief, in an individual case, such a court order might violate due process. *See, e.g., State v. Skaff*, [152 Wis. 2d 48](#), 447 N.W.2d 84 (Ct. App. 1989) (holding that, although court can withhold identity of informers named in presentence report, defendant’s due-process right to sentence based on correct information is violated when circuit court denies defendant access to presentence report). *But see State v. Anwar*, No. 2018AP2222-CR, 2019 WL 2588331 (Wis. Ct. App. June 25, 2019) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (declining to apply *Skaff* and holding that a defendant was not entitled to an otherwise-confidential CHIPS report that was used against her at sentencing in her criminal case). To the extent that a court report functions like a presentence report in a criminal case, counsel might rely on *Skaff* to argue in favor of disclosure on due-process grounds.

#### 4. Victim-Impact Statement [§ 11.12]

For a juvenile found delinquent for committing a felony, the person preparing the court report must attempt to determine the effects of the delinquent act on the victim. [Wis. Stat.](#) § 938.331. If the delinquent act is not a felony but resulted in bodily harm to the victim or in theft of or damage to property, the person preparing the report can, but need not, prepare a victim-impact statement. *Id.*

### F. Permanency Plan [§ 11.13]

#### 1. [What Is a Permanency Plan](#) [§ 11.14]

A permanency plan provides for permanently placing a child. *See* [Wis. Stat.](#) §§ 48.38(1)(b), 938.38(1)(b). The plan should be designed to ensure, whenever appropriate, the child’s reunification with the child’s family. [Wis. Stat.](#) §§ 48.38(1)(b), 938.38(1)(b).

The agency primarily responsible for providing services to a child living in a foster home, group home, residential care center for children and youth, juvenile detention facility, *see* [Wis. Stat.](#) §§ 48.02(10r), 938.02(10r), shelter care facility, *see* [Wis. Stat.](#) §§ 48.02(17), 938.02(17), qualifying residential family-based treatment facility, *see* [Wis. Stat.](#) § 48.02(14m), or supervised independent living arrangement must prepare a written permanency plan if one of the following conditions exists: (1) the child is being held in physical custody under [Wis. Stat.](#) § 48.207 or 938.207, [Wis. Stat.](#) § 48.208 or 938.208, or [Wis. Stat.](#) § 48.209 or 938.209, [Wis. Stat.](#) §§ 48.38(2)(a), 938.38(2)(a); *see also supra* ch. 5 (discussion of physical custody); (2) the agency has legal custody of the child, [Wis. Stat.](#) §§ 48.38(2)(b), 938.38(2)(b); (3) the child is under the supervision of an agency pursuant to a dispositional order or voluntary agreement, [Wis. Stat.](#) §§ 48.38(2)(c), 938.38(2)(c); *see also* [Wis. Stat.](#) §§ 48.355, 48.32, 48.63, 48.64, 938.355, 938.32; (4) the child was placed under a voluntary agreement between the agency and the child’s parent under [Wis. Stat.](#) § 48.63(1)(a) or (bm) or (5)(b) or [Wis. Stat.](#) § 938.63(1)(a) or (5)(b) or under a voluntary transition-to-independent-living agreement under [Wis. Stat.](#) § 48.366(3) or 938.366(3), [Wis. Stat.](#) §§ 48.38(2)(d), 938.38(2)(d); (5) the child is under the guardianship of the agency, [Wis. Stat.](#) §§ 48.38(2)(e), 938.38(2)(e); *see also* [Wis. Stat.](#) § 48.023; (6) the child’s care would have been paid for under [Wis. Stat.](#) § 49.19 (the state’s former program for aid to families with dependent children (AFDC)), [Wis. Stat.](#) §§ 48.38(2)(f), 938.38(2)(f), except if the child’s care is being paid for under [Wis. Stat.](#) § 48.623(1) (subsidized guardianships); or (7) the child’s parent is placed in a foster home, group home, residential care center for children and youth, juvenile detention facility, shelter care facility, or supervised independent living arrangement, and the child is residing with that parent, [Wis. Stat.](#) § 48.38(2)(g). In the case of a child placed in the home of a guardian or a relative other than a parent, the agency must prepare a permanency plan if one of the first five conditions listed above exists. *See* [Wis. Stat.](#) §§ 48.38(2)(a)–(e), 938.38(2)(a)–(e).

The federal Family First Prevention Services Act (FFPSA), Pub. L. No. 115-123, §§ 50701–50782, 132 Stat. 64 (2018) (codified in part at 42 [U.S.C.](#) §§ 670–679c (Title IV-E of the Social Security Act)), was enacted on February 9, 2018, and contains specific requirements related to children placed in a group home or other congregate-care settings. The Wisconsin Legislature enacted 2021 Wis. Act 42 to meet the requirements of the FFPSA. Among the requirements, when a child is placed in a group home or other congregate-care setting, the agency responsible for providing services to that child must assemble a “family permanency team” composed of family members, professionals, and others involved in the child’s life. [Wis. Stat.](#) §§ 48.38(3m), 938.38(3m).

The permanency plan must contain a description of the following:

1. The name, address, and telephone number of the child’s parent, guardian, and legal custodian, [Wis. Stat.](#) §§ 48.38(4)(ag), 938.38(4)(ag);
2. The date on which the child was removed from the child’s home and the date on which the child was placed in out-of-home care, [Wis. Stat.](#) §§ 48.38(4)(am), 938.38(4)(am);

3. All services offered and any services provided in an effort to prevent the removal of the child from the home, while ensuring the child's health and safety, and to achieve the goal of the permanency plan, [Wis. Stat.](#) §§ 48.38(4)(ar), 938.38(4)(ar);

**Note.** The plan need not include a description of the services offered or provided if any of the circumstances in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. applies, *see supra* § 11.10, or if the child has attained 18 years of age. [Wis. Stat.](#) §§ 48.38(4)(ar), 938.38(4)(ar).

4. The basis of the decision to hold the child either in custody or outside the home, [Wis. Stat.](#) §§ 48.38(4)(b), 938.38(4)(b);
5. The availability of a safe and appropriate placement with a fit and willing relative of the child and, if the child is not placed with an available relative, the reasons why that placement is inappropriate or not safe, [Wis. Stat.](#) §§ 48.38(4)(bm), 938.38(4)(bm);
6. If the child has one or more siblings who have been removed from the home, (a) the efforts made to place the child in a placement that enables the sibling group to remain together, and, if a decision is made not to place the child and siblings in a joint placement, a statement as to why such a placement is contrary to the safety or well-being of the child or the siblings; and (b) the efforts made to provide for frequent visitation or interaction, and, if such visitation or interaction is not provided, a statement as to why that would be contrary to the safety or well-being of the child or the siblings, [Wis. Stat.](#) §§ 48.38(4)(br), 938.38(4)(br);
7. The location and type of facility in which the child is held or placed, [Wis. Stat.](#) §§ 48.38(4)(c), 938.38(4)(c);
8. The location and type of facility in which the child will be placed, [Wis. Stat.](#) §§ 48.38(4)(c), 938.38(4)(c);
9. If the child lives more than 60 miles from home, documentation of the unavailability or inappropriateness of placement within 60 miles of the child's home, or in CHIPS cases, documentation that placement more than 60 miles from the child's home is in the child's best interests, [Wis. Stat.](#) §§ 48.38(4)(d), 938.38(4)(d);

**Note.** In CHIPS cases, the placement of a child in a licensed foster home more than 60 miles from the child's home is presumed to be in the best interests of the child if the following documentation is provided: (1) the placement is made pursuant to a voluntary agreement under [Wis. Stat.](#) § 48.63, (2) the voluntary agreement provides that the child may be placed more than 60 miles from the child's home, and (3) the placement is made to facilitate an anticipated adoptive placement. [Wis. Stat.](#) § 48.38(4)(d).

10. Information about the child's education, including the name and address of the child's most recent school, special education programs in which the child has been enrolled, the child's grade level and grade-level performance, and a summary of all available education records that are relevant to any education goals included in the court report, [Wis. Stat.](#) §§ 48.38(4)(dg), 938.38(4)(dg); *see also supra* § 11.9;
11. If the child will be transferred to a different school as a result of the placement, documentation that (a) a placement that would maintain the child in the child's present school is either unavailable or inappropriate, or (b) a placement that would result in the child's transfer to another school is in the child's best interests, [Wis. Stat.](#) §§ 48.38(4)(dm), 938.38(4)(dm);
12. The child's medical information, including the names and addresses of the child's doctor, dentist, and any other health-care provider, the child's immunization record, any known medical condition or past serious medical conditions, and the medications currently taken by the child or to which the child is allergic, [Wis. Stat.](#) §§ 48.38(4)(dr), 938.38(4)(dr);
13. The safety and appropriateness of the placement and of the services provided to the child and family, [Wis. Stat.](#) §§ 48.38(4)(e), 938.38(4)(e);

**Note.** The plan must include a discussion of services that the agency investigated and considered but that are not available and not likely to become available within a reasonable time to meet the child's needs. If services are available, the plan must explain why the agency considers the services not appropriate or not safe. [Wis. Stat.](#) §§ 48.38(4)(e), 938.38(4)(e).

14. The services that will be provided to the child, the child's family, and the child's foster parent, the operator of the facility in which the child is placed, or the relative with whom the child is living to carry out the dispositional order, [Wis. Stat.](#) §§ 48.38(4)(f), 938.38(4)(f);

**Note.** The plan must provide for services to accomplish the proper care and treatment of the child; promote safety and stability in the placement; meet the child's physical, emotional, social, educational, and vocational needs; and improve the conditions of the parents' home to facilitate the child's safe return or, if appropriate, obtain an alternative permanent placement for the child. If the child is 16 years

old or older, an alternative permanent placement could be a placement in some other planned permanent living arrangement that includes an appropriate, enduring relationship with an adult. [Wis. Stat.](#) §§ 48.38(4)(f), 938.38(4)(f).

15. The goal of the permanency plan or the permanency and concurrent permanency goals, including, if applicable, (a) the rationale for placing the child for adoption, with a guardian, or with a fit and willing relative and the efforts made to achieve that goal; or (b) the rationale for determining to engage in concurrent planning and a description of the concurrent plan, [Wis. Stat.](#) §§ 48.38(4)(fg), 938.38(4)(fg);

**Note.** The agency must decide on one or more of the following goals: (1) return the child to the child's home; (2) place the child for adoption; (3) place the child with a guardian; (4) permanently place the child with a fit and willing relative; or (5) if the child is 16 years old or older, place the child in some other planned permanent living arrangement that includes an appropriate, enduring relationship with an adult. [Wis. Stat.](#) §§ 48.38(4)(fg), 938.38(4)(fg).

16. If the agency determines that there is a compelling reason why it currently would not be in the best interests of a child 16 years old or older to return the child to his or her home or to place the child for adoption, with a guardian, or with a fit and willing relative as the permanency goal for the child, the permanency goal of placing the child in some other planned permanent living arrangement, [Wis. Stat.](#) §§ 48.38(4)(fm), 938.38(4)(fm);
17. The conditions for return, including changes that must occur in the parents' conduct, in the child's conduct, or in the home before the child will be safely returned, [Wis. Stat.](#) §§ 48.38(4)(g), 938.38(4)(g);
18. If the child is 14 years old or older, a plan describing the programs and services that are or will be provided to assist the child in preparing for the transition from out-of-home care to a successful adulthood, [Wis. Stat.](#) §§ 48.38(4)(h), 938.38(4)(h);
19. Whether the child's age and developmental level are sufficient for the court to consult with the child at the permanency hearing or for the court or panel to consult with the child at the permanency review, and, if the court decides that it would not be age appropriate or developmentally appropriate for the court or panel to consult with the child, a statement as to why consultation with the child would not be appropriate, [Wis. Stat.](#) §§ 48.38(4)(i), 938.38(4)(i);

**Note.** In a case involving a child 14 years old or older, [Wis. Stat.](#) §§ 48.38(2m) and 938.38(2m) require that the agency preparing the permanency plan do so in consultation with the child and with up to two individuals whom the child selects from his or her "child and family team."

In addition, an agency placing a child with an out-of-home care provider must explain the parameters of the provider's considerations when making decisions about the child's participation in age-appropriate or developmentally appropriate activities. [Wis. Stat.](#) §§ 48.383(2)(b), 938.383(2)(b). The provider must use the "reasonable and prudent parent standard" in making those decisions. [Wis. Stat.](#) §§ 48.383(1), 938.383(1); *see also* [Wis. Stat.](#) §§ 48.02(14r) (defining *reasonable and prudent parent standard*), 938.02(14r) (same). The agency preparing the permanency plan can designate one of the people selected by the child under [Wis. Stat.](#) § 48.38(2m) or 938.38(2m) to be the child's adviser and advocate with respect to application of the reasonable and prudent parent standard.

20. If the child is an Indian child who is placed outside the home of his or her parent or Indian custodian under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) § 938.13 (4), (6), (6m), or (7), (a) the name, address, and telephone number of the child's Indian custodian and tribe; (b) a description of the remedial services and rehabilitation programs offered to prevent the breakup of the Indian child's family; and (c) a statement as to whether the Indian child's placement is in compliance with the order of placement preference and, if the placement is not in compliance with that order, a statement as to whether there is good cause for departing from that order, [Wis. Stat.](#) §§ 48.38(4)(im), 938.38(4)(im).
21. A recommendation regarding placement with a parent in a qualifying residential family-based treatment facility, [Wis. Stat.](#) § 48.38(4)(em);
22. If the child is placed in a qualified residential treatment program, (a) documentation of reasonable and good-faith efforts to identify and include all required individuals on the family permanency team; (b) contact information for members of the family permanency team; (c) information showing that meetings of the family permanency team are held at a time and place convenient for the family, to the extent possible; (d) if reunification is the child's permanency goal, information demonstrating that the parent from whom the child was removed provided input on the members of the family permanency team or why that input was not obtained; (e) information showing that the standardized assessment was used to determine the appropriateness of the placement; (f) the family permanency team's placement preferences, including a recognition that the child should be placed with any siblings unless the court determines that joint placement would be contrary to the child's or any sibling's safety or well-being; (g) if the family placement team's placement preferences are not the same as those of the placement recommended by the qualified individual who conducted the standardized



assessment, the reasons why those preferences were not recommended; (h) the recommendations of the qualified individual who conducted the standardized assessment; and (i) documentation of the court's approval or disapproval, if any, of the placement in a qualified residential treatment program, [Wis. Stat.](#) §§ 48.38(4)(k), 938.38(4)(k); and

23. If the child is a parent or pregnant, (a) a list of the services or programs to be provided to or on behalf of the child to ensure that the child, if pregnant, is prepared and, if a parent, is able to parent, and (b) the out-of-home care prevention strategy for any child born to the parenting or pregnant child, [Wis. Stat.](#) §§ 48.38(4)(L), 938.38(4)(L).

## 2. Time Periods [§ 11.15]

In general, the agency must file the permanency plan with the court within 60 days after the date on which the child was first removed from the child's home. [Wis. Stat.](#) §§ 48.38(3), 938.38(3).

An agency's failure to meet the 60-day period for filing a permanency plan does not vitiate jurisdiction. See [Wis. Stat.](#) §§ 48.315(3), 938.315(3); see also *supra* § 11.6. Certainly, in the event of an agency's delay in filing, the child or parent would have the right to a continuance if either of them needed more time to review the permanency plan.

[Wis. Stat.](#) § 938.38(3) provides two exceptions to the 60-day rule. The first exception involves juveniles "alleged to be delinquent." Juveniles alleged to be delinquent are those held on the basis of a detention order executed by the court *before* adjudication. When an alleged delinquent juvenile is held in secure custody or shelter care and the agency intends to recommend the juvenile's placement in a juvenile correctional facility or secured residential care center for children and youth, the agency need not file a permanency plan if the court follows the recommendation of the agency at disposition. [Wis. Stat.](#) § 938.38(3)(a). If the court does *not* follow the agency's recommendation and instead places the juvenile in another out-of-home placement, the agency must file the permanency plan within 60 days after the date of disposition. *Id.* Under the second exception, if the juvenile returns home after being held for less than 60 days in secure custody or shelter care, the agency need not file a permanency plan. [Wis. Stat.](#) § 938.38(3)(b).

[Wis. Stat.](#) § 48.38(3) also provides an exception to the 60-day rule. Under this statute, if the child is held for fewer than 60 days in a juvenile detention facility, a juvenile portion of a county jail, or a shelter care facility, the agency need not file a permanency plan if the child is returned to his or her home within that time period.

The 60-day rule of [Wis. Stat.](#) §§ 48.38(3) and 938.38(3) is also subject to the provisions of [Wis. Stat.](#) §§ 48.38(4m)(a) and 938.38(4m)(a). Under [Wis. Stat.](#) § 48.38(4m)(a), and under the comparable provisions in [Wis. Stat.](#) § 938.38(4m)(a), the court must hold a hearing to determine the child's permanency plan within 30 days after the date that the court found that one of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. applies. (The circumstances specified in [Wis. Stat.](#) §§ 48.355(2d)(b)1.–5. and 938.355(2d)(b)1.–4. are described in section 11.10, *supra*.) In a case in which such a hearing has been held, the permanency plan must be filed with the court not less than five days before the date of the hearing at which the court will determine the child's permanency plan. [Wis. Stat.](#) §§ 48.38(4m)(a), 938.38(4m)(a).

If the agency has not filed the plan at the time of entering the dispositional order, or if the court has entered a disposition inconsistent with the plan, the agency must prepare a permanency plan consistent with the dispositional order. [Wis. Stat.](#) §§ 48.355(2e)(a), 938.355(2e)(a). A copy of this revised plan must be furnished to the child or the child's counsel or guardian ad litem and to the child's parent or guardian, as well as to the child's CASA and the person representing the public's interest in accordance with [Wis. Stat.](#) § 48.09 or [Wis. Stat.](#) § 938.09. [Wis. Stat.](#) §§ 48.355(2e)(c), 938.355(2e)(c).

## G. Dispositional Orders [§ 11.16]

### 1. What Is a Dispositional Order [§ 11.17]

At the close of the dispositional hearing, the court must make a dispositional order consistent with the statutory requirements of [Wis. Stat.](#) § 48.355 in CHIPS and UCHIPS cases and of [Wis. Stat.](#) § 938.355 in JIPS and delinquency cases. [Wis. Stat.](#) §§ 48.335(5), 938.335(5). The dispositional order must rest on evidence submitted at the dispositional hearing. [Wis. Stat.](#) §§ 48.355(1), 938.355(1). If a court report and victim-impact statement have been prepared in [Wis. Stat.](#) ch. 938 proceedings, the court must consider this information at disposition. [Wis. Stat.](#) § 938.355(1). The dispositional order binds any person or agency providing services for the child or expectant mother. [Wis. Stat.](#) §§ 48.355(5), 938.355(5).

As noted above, the disposition in a [Wis. Stat.](#) ch. 48 case must employ the least restrictive means necessary to ensure the well-being of the child or unborn child. *See supra* § 11.2. The court must also consider the care, treatment, and rehabilitation of the child, the family, the unborn child, and the expectant mother, as well as the protection of the public. [Wis. Stat.](#) § 48.355(1). The court can remove the child or expectant mother from his or her home only when less drastic alternatives are not available. Under [Wis. Stat.](#) ch. 48, preservation of the family unit has priority, but only when the court can accomplish this goal and still ensure the safety and physical health of the child or unborn child. *Id.* In cases under [Wis. Stat.](#) ch. 938, the dispositional order must promote the objectives specified in [Wis. Stat.](#) § 938.01. *See supra* § 11.2. Moreover, if the court has found certain conditions apply in the case, a “less restrictive alternative” than placement in a juvenile correctional facility or secured residential care center for children and youth is not appropriate. [Wis. Stat.](#) § 938.355(1); *see also* [Wis. Stat.](#) § 938.34(4m)(b)1.–3. (listing conditions that support determination that juvenile is a danger to the public and in need of restrictive custodial treatment).

## 2. Time Periods [§ 11.18]

### a. CHIPS and UCHIPS Cases [§ 11.19]

In CHIPS cases, an order made before the child attains 18 years of age that places or continues the child in the child’s home terminates one year after the date on which the order is granted unless the judge specifies a shorter time or terminates the order sooner. [Wis. Stat.](#) § 48.355(4)(a). If the order places or continues placement of the child outside the home, the order terminates on the latest of the following dates unless the judge specifies a shorter period of time or terminates the order sooner: (1) the date on which the child attains 18 years of age; (2) the date that is one year after the date on which the order was granted; (3) the date on which the child attains 19 years of age or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is a full-time student at a secondary school or its vocational or technical equivalent and is reasonably expected to complete the program before attaining 19 years of age; or (4) the date on which the child attains 21 years of age or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is a full-time student at a secondary school or its vocational or technical equivalent and if an individualized education program is in effect for the child. [Wis. Stat.](#) § 48.355(4)(b).

In UCHIPS cases, an order made before the unborn child is born terminates one year after the date on which the order is granted, unless the judge specifies a shorter time or terminates the order sooner. [Wis. Stat.](#) § 48.355(4)(c).

### b. Delinquency and JIPS Cases [§ 11.20]

In delinquency and JIPS cases, an order made before the juvenile attains 18 years of age that places or continues the juvenile in the juvenile’s home terminates one year after the date on which the order is granted, unless the court specifies a shorter time or the court terminates the order sooner. [Wis. Stat.](#) § 938.355(4)(a). If the order places the juvenile or continues placement of the juvenile outside the home, the order terminates on the latest of the following dates unless the judge specifies a shorter time or terminates the order sooner: (1) the date on which the juvenile attains 18 years of age; (2) the date that is one year after the date on which the order was granted; (3) the date on which the juvenile attains 19 years of age or the date on which the juvenile is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the juvenile is a full-time student at a secondary school or its vocational or technical equivalent and is reasonably expected to complete the program before attaining 19 years of age; or (4) the date on which the juvenile attains 21 years of age or the date on which the juvenile is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the juvenile is a full-time student at a secondary school or its vocational or technical equivalent and if an individualized education program is in effect for the juvenile. [Wis. Stat.](#) § 938.355(4)(am).

If the court commits a juvenile to a Type 2 residential care center for children and youth under [Wis. Stat.](#) § 938.34(4d) or to a secured juvenile facility or secured residential care center for children and youth under [Wis. Stat.](#) § 938.34(4m), the court can make the dispositional order apply for up to two years or until the juvenile’s 18th birthday, whichever occurs earlier, unless the court specifies a shorter time or terminates the order sooner. [Wis. Stat.](#) § 938.355(4)(b). If the order does not specify a termination date, it will apply for one year after the date on which the order was granted or until the juvenile’s 18th birthday, whichever is earlier, unless the court terminates the order sooner. *Id.* If the court commits the juvenile to the serious juvenile offender program under [Wis. Stat.](#) § 938.34(4h) before the juvenile turns 18, the court must make the order effective for five years (if the juvenile committed a Class B or C felony or armed burglary) or until the juvenile’s 25th birthday (if the juvenile committed a Class A felony). *Id.*

**Comment.** Because a disposition in delinquency cases does not qualify as a sentence, the court cannot order an adult sentence to run consecutively to a juvenile disposition. [State v. Woods](#), 173 Wis. 2d 129, 137, 496 N.W.2d 144 (Ct. App. 1992). This situation arises when the court waives a juvenile into adult court on one offense while the juvenile remains subject to a dispositional order committing him or her to a juvenile correctional facility for a prior offense.

### 3. [Contents](#)

#### [§ 11.21]

As with many court decisions, the dispositional order must contain written findings of fact and conclusions of law supporting the disposition ordered and resting on the evidence presented at the dispositional hearing. [Wis. Stat.](#) §§ 48.355(2), 938.355(2). For example, if the child or expectant mother had a psychological evaluation, the court must make findings regarding the child's or expectant mother's need for special treatment or care. [Wis. Stat.](#) §§ 48.355(2)(a), 938.355(2)(a). This finding cannot, however, include a finding that the child or expectant mother needs psychotropic medication.

The written court order must contain the following:

1. The specific services to be provided to the child and family, to the child expectant mother and family, or to the adult expectant mother, and, if custody is to be transferred to effect the treatment plan, the identity of the legal custodian, [Wis. Stat.](#) §§ 48.355(2)(b)1., 938.355(2)(b)1.;
2. A notice that certain parties—the child or child expectant mother (if 14 years old or older), the adult expectant mother, the parent, guardian, or legal custodian, or the unborn child's guardian ad litem—can request that the agency providing care or services to the child or expectant mother disclose to them any records kept by the agency about the child or expectant mother, [Wis. Stat.](#) §§ 48.355(2)(b)1m., 938.355(2)(b)1m.;
3. If the order places the child outside the home, the name of the place or facility (including transitional placements) where the child will be cared for or treated (although an exception arises when the court orders, in accord with [Wis. Stat.](#) § 48.33(5) or [Wis. Stat.](#) § 938.33(5), the nondisclosure of the identity of the foster parent), [Wis. Stat.](#) §§ 48.355(2)(b)2., 938.355(2)(b)2.;
4. If the order places an adult expectant mother outside her home, the name of the place or facility (including transitional placements) where the expectant mother will be treated, [Wis. Stat.](#) § 48.355(2)(b)2m.;
5. The date the dispositional order expires, [Wis. Stat.](#) §§ 48.355(2)(b)3., 938.355(2)(b)3.;
6. The amount of support, if any, that the child's parent, guardian, or trustee must pay, [Wis. Stat.](#) §§ 48.355(2)(b)4., 938.355(2)(b)4.;
7. If the child is placed outside the home, an order for the parent to provide a statement of the parent's income, assets, debts, and living expenses, [Wis. Stat.](#) § 48.355(2)(b)4m., or, if the juvenile is placed outside the home, an order for the parent to provide a statement of the juvenile's and parent's income, assets, debts, and living expenses, [Wis. Stat.](#) § 938.355(2)(b)4m.;
8. A permanency plan (if the agency prepared one) for a child placed outside the home, [Wis. Stat.](#) §§ 48.355(2)(b)5., 938.355(2)(b)5.; *see also supra* §§ [11.13–15](#);
9. For a child placed outside the home, the court's finding that continued placement of the child in the home would be contrary to the welfare of the child (or, in a delinquency case, if the juvenile is placed in a relative's home, a foster home, group home, residential treatment center, or Type 2 residential care center for children and youth, *see* [Wis. Stat.](#) § 938.34(3)(a), (c), (cm), (d), (4d), a finding that the juvenile's current residence will not safeguard the juvenile's or community's welfare because of the serious nature of the juvenile's delinquent act); the court's finding as to whether the responsible agency made reasonable efforts to prevent the removal of the child from the home, while ensuring that the child's health and safety are paramount concerns; and, if a permanency plan has previously been prepared for the child, a finding as to whether the responsible agency had made reasonable efforts to achieve the permanency goal of the permanency plan, including, if appropriate, through an out-of-state placement, [Wis. Stat.](#) §§ 48.355(2)(b)6., 938.355(2)(b)6.;

**Note.** A court's finding as to whether an agency made reasonable efforts must include a determination whether a comprehensive assessment of the family's situation was completed, including whether the child's health, safety, and welfare could be protected in the home, [Wis. Stat.](#) §§ 48.355(2c)(a)1., 938.355(2c)(a)1., whether the family received financial assistance, [Wis. Stat.](#) §§ 48.355(2c)(a)2., 938.355(2c)(a)2., and whether the family received services and received assistance enabling the family to use the services, [Wis. Stat.](#) §§ 48.355(2c)(a)3., 938.355(2c)(a)3. Assistance includes in-home support services, such as homemakers and parent aides, [Wis. Stat.](#) §§ 48.355(2c)(a)3.a., 938.355(2c)(a)3.a.; in-home intensive treatment services, [Wis. Stat.](#) §§ 48.355(2c)(a)3.b., 938.355(2c)(a)3.b.; community support services, such as child care, parenting classes, housing assistance, job training, and emergency mental health services, [Wis. Stat.](#) §§ 48.355(2c)(a)3.c., 938.355(2c)(a)3.c.; and services for family members with special needs, [Wis. Stat.](#) §§ 48.355(2c)(a)3.d., 938.355(2c)(a)3.d. In addition, the finding of reasonable efforts must include a determination whether the agency



monitored the client's progress and participation in the services provided, [Wis. Stat.](#) §§ 48.355(2c)(a)4., 938.355(2c)(a)4., and whether the agency considered alternative ways of meeting the family's needs, [Wis. Stat.](#) §§ 48.355(2c)(a)5., 938.355(2c)(a)5. The court must also consider whether the agency implemented visitation schedules between the parent and the child (unless the court denied or limited visitation). [Wis. Stat.](#) §§ 48.355(2c)(b), 938.355(2c)(b).

In CHIPS cases and JIPS cases under [Wis. Stat.](#) § 938.13 (4), (6), (6m), or (7) involving an out-of-home placement of an Indian child, the court's dispositional order must include a finding that the placement is in compliance with the order-of-placement preference under [Wis. Stat.](#) § 48.028(7)(b)1.–4. or [Wis. Stat.](#) § 938.028(6)(a)1.–4., unless the court finds good cause for departing from that order. [Wis. Stat.](#) §§ 48.345(3m), 938.345(1m).

10. For a child placed in a residential care center for children and youth, a group home, or a shelter care facility, a finding as to the following: whether the child's needs can be met through placement in a foster home; whether placement of the child in a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment; whether the placement is consistent with the child's short-term and long-term goals, as identified in permanency planning; and whether the court approves or disapproves the placement, [Wis. Stat.](#) §§ 48.355(2)(b)6d., 938.355(2)(b)6d.;
11. If the child is placed outside the home under the supervision of the county department (or, in a Children's Code proceeding in Milwaukee County, the DCF), an order ordering the child into the placement and care responsibility of the county department (or the DCF), as required under 42 [U.S.C.](#) § 672(a)(2), and assigning the county department (or the DCF) primary responsibility for providing services to the child, [Wis. Stat.](#) §§ 48.355(2)(b)6g., 938.355(2)(b)6g.;
12. A statement that the court approves the out-of-home placement recommended by the agency under [Wis. Stat.](#) § 48.33(1) or [Wis. Stat.](#) § 938.33(1), if that recommendation is followed, or a statement that the court has given bona fide consideration to the agency's and parties' recommendations, if the agency's recommendation for placement is not followed, [Wis. Stat.](#) §§ 48.355(2)(b)6m., 938.355(2)(b)6m.;
13. If the child is placed outside the home and if the child has one or more siblings who have also been placed outside the home, a finding as to whether the responsible agency has made reasonable efforts to place the child in a placement that enables the sibling group to remain together, unless the court determines that a joint placement would be contrary to the safety or well-being of the child or any siblings, in which case the court must order the responsible agency to make reasonable efforts to provide for frequent visitation or other ongoing interaction between them, unless the court determines that the visitation or interaction would be contrary to their safety or well-being, [Wis. Stat.](#) §§ 48.355(2)(b)6p., 938.355(2)(b)6p.;
14. If the court finds that any of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. applies, a determination that the responsible agency is not required to make reasonable efforts with respect to the parent to make it possible for the child to return safely home, [Wis. Stat.](#) §§ 48.355(2)(b)6r., 938.355(2)(b)6r.;
15. If the child is an Indian child in a [Wis. Stat.](#) ch. 48 proceeding or in a JIPS action under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), who is being removed from the home of his or her parent or Indian custodian and placed outside that home, a finding supported by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and a finding that active efforts have been made to prevent the breakup of the child's family and that those efforts have proved unsuccessful, [Wis. Stat.](#) §§ 48.355(2)(b)6v., 938.355(2)(b)6v.;
16. A statement of the conditions with which the child or expectant mother must comply, [Wis. Stat.](#) §§ 48.355(2)(b)7., 938.355(2)(b)7.;
17. If the juvenile is placed outside the home under [Wis. Stat.](#) § 938.34(4m), the name of the county department that will provide supervision and determine placement for the juvenile, [Wis. Stat.](#) § 938.355(2)(b)2m.; and
18. If the juvenile is placed outside the home under [Wis. Stat.](#) § 938.34(4m), a statement that the court has given bona fide consideration to the recommendations made by the agency and all parties relating to the juvenile's placement, [Wis. Stat.](#) § 938.355(2)(b)6n.

**Note.** If school attendance is a condition of the order, the order must also specify what constitutes a violation of the condition and direct the child's school to notify the supervising department within five days after any violation of the condition by the child. [Wis. Stat.](#) §§ 48.355(2)(c), 938.355(2)(c).

**Caution.** The court of appeals has held these components mandatory. *F.T. v. State (In the Int. of F.T.)*, 150 Wis. 2d 216, 441 N.W.2d 322 (Ct. App. 1989) (interpreting [Wis. Stat.](#) ch. 48 precursors to [Wis. Stat.](#) § 938.355(2)(b)7. and (6)(a)).

The dispositional order can identify transitional placements. However, the procedures governing changes in placement, [Wis. Stat.](#) §§ 48.357, 938.357; *see also infra* [ch. 12](#) (postdispositional hearings), and revisions of the dispositional orders, [Wis. Stat.](#) §§ 48.363, 938.363, must be followed before a different placement may be implemented. An exception to this general rule exists for the interim placement of the child or expectant mother until the placement ordered by the court becomes available. [Wis. Stat.](#) §§ 48.355(2m), 938.355(2m).

The dispositional order can set reasonable rules for visitation, but only after notice to the parents and a hearing on the issue of visitation. [Wis. Stat.](#) §§ 48.355(3), 938.355(3). As a general rule, the court may not grant visitation if the child's parent has been convicted of first- or second-degree intentional homicide of the child's other parent, unless the conviction has been reversed, set aside, or vacated. However, if the court determines by clear and convincing evidence that visitation would be in the best interests of the child, taking into account the child's wishes, the court may permit visitation. [Wis. Stat.](#) §§ 48.355(3), 938.355(3).

Finally, a dispositional order involving a child or unborn child found to be in need of protection or services and placing the child or expectant mother outside the home must contain the warnings of [Wis. Stat.](#) § 48.356 or [Wis. Stat.](#) § 938.356. *See infra* § 11.53. An order must advise the parent or expectant mother of potential grounds for termination of parental rights and of the conditions necessary for the child's or expectant mother's return or for the parent to be granted visitation. [Wis. Stat.](#) §§ 48.356(2), 938.356(2). Parents of any juvenile found to be delinquent and placed through a dispositional order outside the home must also be advised of potential grounds for termination of parental rights and the conditions necessary for the juvenile to be returned home or for the parent to be granted visitation. [Wis. Stat.](#) § 938.356.

## H. Case-Closure Orders [§ 11.22]

A court may terminate delinquency supervision in favor of a case-closure order, which effectively imposes a family court order on the child and the parents or guardians. [Wis. Stat.](#) §§ 48.355(4g), 938.355(4g). If the child is also subject to an action affecting the family under [Wis. Stat.](#) ch. 767, then the juvenile court may enter an order determining family court provisions, such as custody, periods of physical placement, visitation, child support, and the duty to provide health insurance. [Wis. Stat.](#) §§ 48.355(4g)(a), 938.355(4g)(a). Such an order overrides any previous family court order. [Wis. Stat.](#) §§ 48.355(4g)(e), 938.355(4g)(e). Enforcement of the case closure order is governed by provisions in [Wis. Stat.](#) ch. 767.

## IV. Dispositional Alternatives in Delinquency and JIPS Cases [§ 11.23]

### A. In General [§ 11.24]

In delinquency cases, fundamental fairness provides the standard for determining whether the dispositional hearing meets the requirements of due process. *G.G.D. v. State*, 97 Wis. 2d 1, 8, 292 N.W.2d 853 (1980). [Wis. Stat.](#) § 938.34 articulates the various dispositions available to the juvenile court after adjudicating a child delinquent. [Wis. Stat.](#) § 938.345 provides that if a court finds that a juvenile is in need of protection or services, the court must enter an order for a disposition as provided under [Wis. Stat.](#) § 938.34, with certain exceptions. *See infra* § 11.48 (listing exceptions).

In both delinquency and JIPS cases, the court can combine dispositions under a care and treatment plan. [Wis. Stat.](#) § 938.34. The court must combine a disposition ordering a delinquent juvenile to a correctional placement under [Wis. Stat.](#) § 938.34(4m) with a disposition ordering aftercare supervision under [Wis. Stat.](#) § 938.34(4n). In deciding the appropriate disposition, the court must consider the seriousness of the act for which the court adjudicated the juvenile delinquent and can take into consideration any other delinquent act dismissed and read into the record at the time of adjudication. [Wis. Stat.](#) § 938.34.

### B. Supervision

#### [§ 11.25]

The court can order the juvenile placed under the supervision of an agency, the county department, the Department of Corrections (DOC), or a suitable adult, and include reasonable rules for the juvenile's conduct. [Wis. Stat.](#) § 938.34(2)(a). Supervision by the DOC under [Wis. Stat.](#) § 938.34(2)(a) is permitted only until all juveniles are transferred from the Type 1 juvenile correctional facility at Lincoln Hills, pursuant to 2017 Wis. Act 185 (setting deadline of no later than January 1, 2021) and 2019 Wis. Act 8 (extending deadline to July 1, 2021). *See infra* § 11.26. The court must design the rules for the physical, mental, and moral well-being and behavior of the juvenile. [Wis. Stat.](#)

§ 938.34(2)(a). The supreme court has held that because restitution promotes the moral well-being and behavior of the child, the court can order a delinquent child to pay restitution for offenses dismissed and read in. *R.W.S. v. State (In the Int. of R.W.S.)*, [162 Wis. 2d 862](#), 873, 471 N.W.2d 16 (1991).

**Comment.** As of the date of publication of this edition of the *Wisconsin Juvenile Law Handbook*, the deadlines for construction of secured residential care centers for children and youth that were authorized by 2017 Wis. Act 185 have been surpassed. *See also* 2019 Wis. Act 8. Although 2021 Wis. Act 252 has authorized the state to contract additional debt for the purpose of constructing a new Type 1 juvenile correctional facility in Milwaukee County, and the DOC has announced a site selection for that facility, attorneys should be alert to ongoing developments with this construction. Because the state has not met the legislatively set deadlines, attorneys might want to challenge the validity of placement at current Type 1 juvenile correctional facilities at Copper Lake or Lincoln Hills Schools if it is not consistent with current Wisconsin law.

**Comment.** The supreme court has held that the reasonableness of a condition of probation in a criminal case depends on whether the condition serves to effect the objectives of probation. *State v. Heyn*, [155 Wis. 2d 621](#), [629](#), 456 N.W.2d 157 (1990). In adult cases, the dual objectives are rehabilitation of the defendant and protection of the state and community interest. *Id.* In delinquency cases, the focus shifts to the “moral well-being and behavior of the child.” *R.W.S.*, 162 Wis. 2d at 873. Just as a condition of probation must “fairly relate” to the offense, so must a rule of supervision fairly relate to the child or the adjudicated offense. As the court noted in *Heyn*, “a condition of probation which requires the convicted person to pay out funds as a consequence of his or her criminal activity must be fairly related to the damage caused by the offender and to his or her ability to pay.” 155 Wis. 2d at 629. Indeed, some of the dispositional alternatives articulated in [Wis. Stat.](#) § 938.34 explicitly rest on a relevant condition. For instance, under [Wis. Stat.](#) § 938.34(14m), the court can restrict or suspend a juvenile’s driving privileges, but only if the court has adjudicated him or her delinquent for a crime involving a motor vehicle.

The court can place the juvenile in the juvenile’s home under the supervision of an agency, the county department, or the DOC and order the agency, the county department, or the DOC to provide specific services to the juvenile and the juvenile’s family. [Wis. Stat.](#) § 938.34(2)(b). Supervision by the DOC under [Wis. Stat.](#) § 938.34(2)(b) is permitted only until all juveniles are transferred from the Type 1 juvenile correctional facilities at Copper Lake and Lincoln Hills Schools, pursuant to 2017 Wis. Act 185 and 2019 Wis. Act 8. *See infra* § [11.26](#); *see also supra*. Because of delays in building and implementing the new Type 1 juvenile correctional facility authorized by 2017 Wis. Act 185 and 2019 Wis. Act 8, attorneys should be alert to developments in changes to DOC facilities as they become available and should also consider challenges to the legal validity of new placements to Copper Lake or Lincoln Hills Schools given the passage of previously set deadlines for the closure of those facilities. Services can include (but are not limited to) counseling, homemaker or parent-aide services, respite care, housing assistance, child care, or parent-skills training. [Wis. Stat.](#) § 938.34(2)(b).

The court can order the juvenile to remain at the juvenile’s home or present placement, for a period of not more than 30 days, under specified rules of supervision. [Wis. Stat.](#) § 938.34(2)(c).

The court can order the juvenile to participate in an intensive supervision program. [Wis. Stat.](#) § 938.34(2r). Counties have the option of providing intensive supervision programs that must include intensive surveillance and community-based treatment services for participants. [Wis. Stat.](#) § 938.534(1)(a). The programs can include electronic monitoring. *Id.* Under [Wis. Stat.](#) § 938.534(1)(a), a caseworker providing services under this program can have a caseload of no more than 10 juveniles and must have not less than one face-to-face contact per day with each juvenile assigned to the caseworker. The face-to-face contact requirement does not apply to a juvenile placed under [Wis. Stat.](#) § 938.534(1)(b) or (c). *Id.* If the juvenile violates any conditions of participation in the program, the caseworker, or any other person authorized to provide intake or dispositional services under [Wis. Stat.](#) § 938.067 or [Wis. Stat.](#) § 938.069, can take the juvenile into custody without a hearing and place the juvenile in a juvenile detention facility, the juvenile portion of a county jail, or nonsecure custody for not more than 72 hours while the alleged violation and the appropriateness of a sanction or a change in the juvenile’s conditions are being investigated or as a consequence of that violation. Such a placement is permitted only if the court explained at the dispositional hearing the conditions and the possibility of the placement to the juvenile, or if the juvenile has acknowledged in writing the receipt of notice of the conditions and possible placement. [Wis. Stat.](#) § 938.534(1)(b). The caseworker can take a juvenile into custody without a hearing and place him or her in nonsecure custody for not more than 30 days if the juvenile needs crisis intervention and has received proper notice at the dispositional hearing. [Wis. Stat.](#) § 938.534(1)(c). *See also* [Wis. Admin. Code](#) ch. DCF 81 for the administrative rules regarding the intensive supervision program.

## C. [Placement Outside the Home](#)

### [§ 11.26]

The court can order that the juvenile be placed in one of several settings outside the juvenile's home. For example, the court can order the juvenile placed in a relative's home, [Wis. Stat. § 938.34\(3\)\(a\)](#); a licensed foster home under [Wis. Stat. § 48.62](#) or licensed group home under [Wis. Stat. § 48.625](#), [Wis. Stat. § 938.34\(3\)\(c\)](#); a "second-chance" group home under [Wis. Stat. § 48.625\(1m\)](#), if the juvenile meets certain criteria, [Wis. Stat. § 938.34\(3\)\(cm\)](#); a home not licensed (if placement runs for less than 30 days), [Wis. Stat. § 938.34\(3\)\(b\)](#); or a residential treatment center operated by a child welfare agency licensed under [Wis. Stat. § 48.60](#), [Wis. Stat. § 938.34\(3\)\(d\)](#).

**Note.** Placement with a parent or relative who has been convicted of the first- or second-degree intentional homicide of the juvenile's parent is prohibited unless the conviction has been reversed, set aside, or vacated, or unless the prohibition is overridden by clear and convincing evidence that such placement is in the best interests of the juvenile. Placement in the home of a person who is not required to be licensed cannot be made if the person has been convicted of the first- or second-degree intentional homicide of the juvenile's parent unless the conviction has been reversed, set aside, or vacated, or unless the prohibition is overridden by clear and convincing evidence that such placement is in the best interests of the juvenile. [Wis. Stat. § 938.34\(3\)\(a\)1.](#), (b)1. The statutes provide similar prohibitions against placement in the home of a relative other than the parent or in the home of another person if the court finds that the relative or person has been convicted of, has pleaded no contest to, or has had a charge dismissed or amended as a result of a plea agreement for certain specified crimes, such as sexual assault. [Wis. Stat. § 938.34\(3\)\(a\)2.](#), (b)2.

In addition, the court can order a juvenile placed either in a juvenile detention facility or juvenile portion of a county jail that meets the standards promulgated by the DOC or in a place of nonsecure custody designated by the court. [Wis. Stat. § 938.34\(3\)\(f\)](#). (This disposition is not available in JIPS cases. See [Wis. Stat. § 938.345\(1\)\(g\)](#); see also *infra* § 11.48.) Several conditions must attach to these placements. First, the court can order the placement for any combination of single or consecutive days, but totaling no more than 365 days in a juvenile detention facility under [Wis. Stat. § 938.22\(2\)\(d\)1.](#) and no more than 30 consecutive days in any other juvenile detention facility. [Wis. Stat. § 938.34\(3\)\(f\)1.](#) The placement in another juvenile detention facility includes any placement under [Wis. Stat. § 938.34\(3\)\(a\)–\(e\)](#), which includes the home of a parent or other relative ([Wis. Stat. § 938.34\(3\)\(a\)](#)), the home of a person not required to be licensed ([Wis. Stat. § 938.34\(3\)\(b\)](#)), a foster home or group home ([Wis. Stat. § 938.34\(3\)\(c\)](#)), a group home for custodial parents or expectant mothers ([Wis. Stat. § 938.34\(3\)\(cm\)](#)), a residential treatment center ([Wis. Stat. § 938.34\(3\)\(d\)](#)), and an independent living situation ([Wis. Stat. § 938.34\(3\)\(e\)](#)). The juvenile must receive credit for all time spent in juvenile detention in connection with the course of conduct for which the court imposed detention or nonsecure custody. Second, the order can provide for the juvenile's release during specified hours to attend school or work or to attend or participate in any activity that the court considers beneficial to the juvenile. [Wis. Stat. § 938.34\(3\)\(f\)2.](#) Third, the court cannot place the juvenile in a juvenile detention facility or in a juvenile portion of a county jail unless the county board of supervisors has authorized the use of this type of placement as a disposition. [Wis. Stat. § 938.34\(3\)\(f\)3.](#)

The court can also order a juvenile who has been adjudicated delinquent placed in a juvenile correctional facility or a secured residential care center for children and youth. [Wis. Stat. § 938.34\(4m\)](#); see also [Wis. Stat. § 938.02\(10r\)](#) (defining *juvenile correctional facility*), (19r) (defining *Type 2 residential care center for children and youth*). The court can order this more restrictive placement, however, only if the following conditions of [Wis. Stat. § 938.34\(4d\)](#) or (4m) have been met:

1. The court must have found the juvenile delinquent for an act that, if committed by an adult, would be punishable by a sentence of six months or more. [Wis. Stat. § 938.34\(4d\)\(a\)](#), (4m)(a).

**Comment.** The court of appeals has interpreted this condition to embrace all felonies and Class A misdemeanors. [Wis. Stat. § 939.51](#) defines a *Class A misdemeanor* as one punishable by a fine not to exceed \$10,000, imprisonment not to exceed nine months, or both. Therefore, in *C.G. v. State (In the Interest of C.G.)*, 154 Wis. 2d 298, 453 N.W.2d 494 (Ct. App. 1990), the court of appeals found that the juvenile court had properly placed a juvenile in a secured correctional facility for a violation of [Wis. Stat. § 941.22\(1\)](#) (1985–86) (now [Wis. Stat. § 948.60\(2\)](#)), prohibiting a minor to go armed with a pistol, even though an adult cannot be convicted of this offense and one of the three conditions for placement therefore could not have been met. Note that, following the court's reasoning, a juvenile court's placement of the juvenile in a Type 2 residential care center for children and youth under [Wis. Stat. § 938.34\(4d\)](#) would also be proper. The court based its decision on the "clear and manifest purpose" of [Wis. Stat. § 48.34\(4m\)](#) (now [Wis. Stat. § 938.34\(4m\)](#)), to permit placement in a secured correctional facility if the juvenile committed acts sufficiently serious to qualify as felonies or Class A misdemeanors. *C.G.*, 154 Wis. 2d at 303.

2. The evidence must demonstrate, and the court must find, that the juvenile poses a danger to the public. [Wis. Stat. § 938.34\(4d\)\(b\)](#), (4m)(b). The state need not prove dangerousness to obtain extensions of commitment orders under [Wis. Stat. § 938.365](#). *R.E.H. v. State (In the Int. of R.E.H.)*, 101 Wis. 2d 647, 305 N.W.2d 162 (Ct. App. 1981). Commission of certain delinquent acts constitutes prima facie evidence of a juvenile's dangerousness. See [Wis. Stat. § 938.34\(4m\)\(b\)](#). The court must also determine, however, that placement in the serious juvenile offender program, see [Wis. Stat. § 938.34\(4h\)](#), would not be appropriate. [Wis. Stat. § 938.34\(4d\)\(b\)](#), (4m)(b). Before the court can place a juvenile in a Type 2 residential care center for children and youth, the court must also determine that placement in a juvenile correctional facility would not be appropriate.



**Comment.** The supreme court has held that *danger to the public* means “exposes the public to harm, injury, pain or loss.” *B.M. v. State (In the Int. of B.M.)*, 101 Wis. 2d 12, 18, 303 N.W.2d 601 (1981). Thus, the court can find a juvenile a danger to the public if the juvenile presents an actual or potential threat to the *property* of another. *Id.* The legislature did not intend to limit the meaning of “danger to the public” to children threatening physical violence or injury. *Id.* Not every delinquent act demonstrates danger to the public, however. For example, the state might not be able to demonstrate dangerousness for a juvenile convicted of obstructing an officer, see [Wis. Stat. § 946.41](#), when the juvenile’s prior contacts have involved only such activities as truancy, running away, possession of alcohol, and curfew violations. *State v. L.L.C. (In the Int. of L.L.C.)*, No. 91-1646-FT, 1991 WL 285924 (Wis. Ct. App. Nov. 7, 1991) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)); see also *J.R. v. State (In the Int. of J.R.)*, No. 82-2428, 1983 WL 161556 (Wis. Ct. App. July 26, 1983) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)) (charge of obstructing an officer was insufficient proof of dangerousness).

**Note.** The conditions listed in [Wis. Stat. § 938.34\(4m\)\(b\)](#) provide prima facie evidence that the juvenile is a danger to the public. Under [Wis. Stat. § 938.34\(4m\)\(b\)1.](#), any violation of [Wis. Stat. § 940.01](#) (first-degree intentional homicide), 940.02 (first-degree reckless homicide), 940.03 (felony murder), 940.05 (second-degree intentional homicide), 940.19(2)–(6) (felony battery), 940.198 (elder abuse), 940.21 (mayhem), 940.225(1) (first-degree sexual assault), 940.31 (kidnapping), 941.20(3) (endangering safety by use of a dangerous weapon by intentionally discharging firearm from a vehicle), 943.02(1) (arson of a building), 943.23(1g) (carjacking), 943.32(2) (armed robbery), 947.013(1t), (1v), or (1x) (harassment), 948.02(1) or (2) (sexual assault of a child), 948.025 (repeated sexual assault of a child), 948.03 (physical abuse of a child), or 948.085(2) (sexual assault of a child placed in substitute care), that would be a felony if committed by an adult, is prima facie evidence of dangerousness. Under [Wis. Stat. § 938.34\(4m\)\(b\)2.](#), a juvenile’s possession or use of, or threat to use a handgun (as defined in [Wis. Stat. § 175.35\(1\)\(b\)](#)), a short-barreled rifle (as defined in [Wis. Stat. § 941.28\(1\)\(b\)](#)), or a short-barreled shotgun (as defined in [Wis. Stat. § 941.28\(1\)\(c\)](#)) while committing a delinquent act that would be a felony if committed by an adult, is prima facie evidence of dangerousness. Under [Wis. Stat. § 938.34\(4m\)\(b\)3.](#), if the juvenile has possessed or gone armed with a short-barreled rifle, a short-barreled shotgun, or a handgun in violation of [Wis. Stat. § 941.28](#) or [Wis. Stat. § 948.60](#), the court must treat those facts as prima facie evidence of dangerousness.

3. The evidence must demonstrate, and the court must find, that the juvenile needs restrictive custodial treatment. [Wis. Stat. § 938.34\(4d\)\(b\), \(4m\)\(b\)](#).

**Comment.** The supreme court has held that the least restrictive alternative test applicable to mental commitments under [Wis. Stat. ch. 51](#) could not apply to disposition in juvenile cases under the former [Wis. Stat. ch. 48](#). *J.K. v. State (In the Int. of J.K.)*, 68 Wis. 2d 426, 228 N.W.2d 713 (1975). In *J.K.*, the court held that the juvenile court must state reasons for the disposition after considering other available alternatives, but that the state need not prove beyond a reasonable doubt what alternatives were available, what alternatives were investigated, and why the investigated alternatives were not appropriate. *Id.* at 433–34. In a later case, *B.M. v. State (In the Interest of B.M.)*, 101 Wis. 2d at 22, the court affirmed its statement in *J.K.*, holding that the juvenile court had properly considered and rejected less restrictive dispositions and that “the selection of any one alternative [disposition] does involve and require the rejection of others, less or more onerous, as comparatively inappropriate.” The holding in *B.M.* rested on the mandate of [Wis. Stat. § 48.355\(1\)](#), which explicitly requires a court to make a disposition “least restrictive of the rights of the parent or child.” Although the legislature has omitted the term *least restrictive alternative* from [Wis. Stat. § 938.355](#), the concept has a constitutional basis whenever the state puts an individual’s freedom at risk.

In JIPS cases, the court cannot place the juvenile in a juvenile correctional facility or secured residential care center for children and youth. [Wis. Stat. § 938.345\(1\)\(a\)](#); see *infra* § 11.49. Also, in JIPS cases under [Wis. Stat. § 938.13 \(4\), \(6\), \(6m\), or \(7\)](#) involving an out-of-home placement of an Indian juvenile, the court must designate a placement that complies with the order-of-placement preference under [Wis. Stat. § 938.028\(6\)\(a\)1.–4.](#), unless the court finds good cause for departing from that order. [Wis. Stat. § 938.345\(1m\)](#).

The Wisconsin Legislature, in 2018, passed legislation to restructure juvenile correctional placements by transferring all juveniles from the Type 1 juvenile correctional facilities at Copper Lake and Lincoln Hills Schools into new, DOC-established Type 1 correctional facilities for serious juvenile offender placements as well as additional secured residential care centers for children and youth. 2017 Wis. Act 185 (setting original deadline no later than January 1, 2021); 2019 Wis. Act 8 (extending deadline to July 1, 2021). 2017 Wis. Act 185 provided funding for additional secured residential care centers for children and youth, to be operated by counties by contract with the state. Despite the changes to the structure of available juvenile correctional placements, courts must make the same findings described above for placement in the new facilities. [Wis. Stat. § 938.34\(4m\)](#).

**Note.** As of the date of publication of this edition of the *Wisconsin Juvenile Law Handbook*, the deadlines for construction of secured residential care centers for children and youth that were authorized by 2017 Wis. Act 185 have been surpassed. See also 2019 Wis. Act 8. Although 2021 Wis. Act 252 has authorized the state to contract additional debt for the purpose of constructing a new Type 1 juvenile

correction facility in Milwaukee County and the DOC has announced a site selection for that facility, attorneys should be alert to ongoing developments with this construction. Because the state has not met the statutorily set deadlines, attorneys might want to challenge the validity of new placements to the Type 1 juvenile correctional facilities at Copper Lake or Lincoln Hills Schools given the passage of previously set deadlines for the closure of those facilities.

**Comment.** Although 2019 Wis. Act 8 provides the target deadlines noted in this section, the contemplated county-supervised secured residential care centers are still in the development-and-approval stage, so attorneys should be alert to ongoing developments and determine whether the legislatively imposed deadlines are adhered to.

## D. Transfer of Legal Custody [§ 11.27]

The court can order legal custody of a juvenile transferred from the juvenile's parent or guardian to the child's relative, the county department, or a licensed child welfare agency. [Wis. Stat. § 938.34\(4\)](#). [Wis. Stat. §§ 48.60, 48.61, and 48.62](#) govern the powers, duties, and licensing of child welfare agencies. [Wis. Stat. §§ 48.02\(12\) and 938.02\(12\)](#) define *legal custody*. Legal custody can be transferred under [Wis. Stat. § 938.34\(4\)](#) only if the evidence demonstrates that "the rehabilitation or the treatment and care of the juvenile cannot be accomplished by means of voluntary consent of the parent or guardian." [Wis. Stat. § 938.34\(4\)](#).

**Comment.** A commonsense interpretation of this statutory provision permits the court to order the juvenile's custody transferred if the parent *refuses* to assist in juvenile's rehabilitation, care, or treatment. The statute seems ambiguous, however. How can the parent's voluntary consent *accomplish* the rehabilitation, care, and treatment of the juvenile? What if the parent voluntarily consents to take the juvenile to counseling, but to no avail? Arguably, under the plain wording of the statute, the court could still order custody transferred. An interpretation allowing the court to order custody transferred under any scenario (when the parent does not cooperate, when the parent cooperates but the juvenile refuses, or when both the parent and juvenile cooperate but rehabilitation does not actually occur) would yield absurd results clearly contrary to the policy of the Juvenile Justice Code. Statutory construction favors an interpretation that fulfills the purpose of a statute over one that defeats the manifest purpose of the act. [Sonnenburg v. Grohskopf](#), 144 Wis. 2d 62, 66, 422 N.W.2d 925 (Ct. App. 1988).

## E. Drug Offenses [§ 11.28]

A juvenile who commits a drug offense generally faces suspension of driving privileges, as well as payment of a forfeiture or participation in a supervised work program or other community service work.

If the court finds a juvenile to have committed any of most drug offenses under [Wis. Stat. ch. 961](#) (the Uniform Controlled Substances Act), the court may suspend the juvenile's driving privileges for not less than six months but not more than five years. [Wis. Stat. § 938.34\(14r\)\(a\)](#). However, when the juvenile violates the laws against possession of drug paraphernalia, [Wis. Stat. § 961.573\(2\)](#), manufacture or delivery of drug paraphernalia, [Wis. Stat. § 961.574\(2\)](#), or delivery of drug paraphernalia to a minor, [Wis. Stat. § 961.575\(2\)](#), or any local ordinance that strictly conforms to one of these paraphernalia statutes, the court cannot suspend or revoke driving privileges under [Wis. Stat. § 938.34](#). [Wis. Stat. § 938.34\(14r\)\(b\)](#).

Instead, a juvenile who violates any of the paraphernalia laws noted above is subject to a dispositional order under [Wis. Stat. § 938.344\(2e\)](#), which requires the court to suspend the juvenile's driving privileges for not less than six months but not more than five years. In addition, the court must order the juvenile to participate in a supervised work program or other community service work or pay a forfeiture, or both. [Wis. Stat. § 938.344\(2e\)\(a\)1.–3](#). The amount of the forfeiture depends on the offense: not more than \$50 for a first offense, not more than \$100 for a violation committed within 12 months after a previous violation, and not more than \$500 for a violation committed within 12 months after two or more previous violations. *Id.*

If the court finds the juvenile guilty of possessing or attempting to possess a controlled substance or controlled substance analog (unless the juvenile obtained the substance by prescription), the court must order a forfeiture of not more than \$50 for the first offense, a forfeiture of not more than \$100 for an offense committed within 12 months after a previous violation, or a forfeiture of not more than \$500 for an offense committed within 12 months after two or more previous violations. [Wis. Stat. § 938.34\(14s\)\(a\)1.–3](#). The controlled substances listed are schedule I or II narcotics, cocaine or cocaine derivatives, certain hallucinogenic and stimulant drugs, tetrahydrocannabinols (THC) (including marijuana), gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine, flunitrazepam, synthetic cannabinoids, methamphetamine, and any other controlled substance. See [Wis. Stat. § 961.41\(3g\)](#). [Wis. Stat. § 961.01\(15\)](#) defines *narcotic drug*, [Wis. Stat. § 961.14](#) lists schedule I controlled substances, and [Wis. Stat. § 961.16](#) lists schedule II controlled substances.

If the court finds a juvenile guilty of manufacture, distribution, or delivery of a controlled substance, or of possession with intent to manufacture, distribute, or deliver a controlled substance, see [Wis. Stat. § 961.41\(1\), \(1m\)](#), the judge must order a forfeiture of not less than \$250 nor more than \$500 for a first violation, a forfeiture of not less than \$300 for a violation committed within 12 months after a previous violation, and a forfeiture of \$500 for a violation committed within 12 months after two or more previous violations. [Wis. Stat. § 938.34\(14s\)\(am\)1.–3.](#)

A judge has the authority to stay, with the juvenile's permission, any of the forfeitures noted above, but the court must order the juvenile to do at least one of the following: submit to an alcohol or other drug abuse assessment, participate in outpatient treatment, or participate in an alcohol or other drug abuse education program. [Wis. Stat. § 938.34\(14s\)\(b\)1.–3.](#) The assessment must conform to the criteria of [Wis. Stat. § 938.547\(4\)](#), and only an approved treatment facility can conduct the assessment. [Wis. Stat. § 938.34\(14s\)\(b\)1.](#) ([Wis. Stat. § 938.547](#) governs multidisciplinary screens. See *supra* [ch. 6.](#)) [Wis. Stat. § 938.02\(1s\)](#) incorporates by reference [Wis. Stat. § 51.01\(2\)](#), which defines an *approved treatment facility* as one “approved by the department [of health services] for treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons.” If the alcohol or other drug abuse assessment shows that the juvenile does not need treatment or education, or if the juvenile completes treatment or education, the court must notify the juvenile whether it will reinstate the forfeiture. [Wis. Stat. § 938.34\(14s\)\(c\), \(d\)](#). The treatment facility conducting the assessment cannot release this information to the agency responsible for providing services to the juvenile unless the facility first obtains the written informed consent of the juvenile or, if the juvenile is younger than 12 years of age, the written informed consent of the parent. *Id.* If the juvenile does not participate in the required program or does not satisfactorily complete the program, the court must reinstate the original forfeiture. [Wis. Stat. § 938.34\(14s\)\(e\)](#).

Disposition for a drug offense may also depend on the premises where the juvenile possessed or attempted to possess drugs. If the court finds the juvenile guilty of possessing or attempting to possess a controlled substance while in or on the premises of a scattered-site public housing project, or in or within 1,000 feet of a public park, a jail or correctional facility, a multiunit public housing project, a public swimming pool, a youth center, see [Wis. Stat. § 961.01\(22\)](#) (defining *youth center* as “any center that provides, on a regular basis, recreational, vocational, academic or social services activities for persons younger than 21 years old or for those persons and their families”), a community center, any private, tribal, or public school, or any school bus, see [Wis. Stat. § 340.01\(56\)](#) (defining *school bus*), the court must order the juvenile to participate for 100 hours in a supervised work program or to perform 100 hours of community service. [Wis. Stat. § 938.34\(14t\)](#). [Wis. Stat. § 938.34\(5g\)](#) defines and provides for supervised work programs or other community service work as dispositional alternatives. See *infra* [§ 11.33](#).

## F. Restitution [§ 11.29]

If the court finds that a juvenile committed a delinquent act resulting in damage to the property of another or in actual physical injury to another (excluding pain and suffering), the court can order the juvenile to repair the damage to the property or to make any reasonable restitution for the damage to the property or the injury, if the court determines, after taking into account the well-being and needs of the victim, that restitution would benefit the well-being and behavior of the child. [Wis. Stat. § 938.34\(5\)\(a\)](#). Reasonable restitution can be in the form of cash payments or, if the victim agrees, the performance of services, or both. *Id.* *Damage to the property of another* includes unrecovered property stolen by the child. [I.V. v. State \(In the Int. of I.V.\)](#), 109 Wis. 2d 407, 326 N.W.2d 127 (Ct. App. 1982).

**Comment.** As noted above, the court can order restitution for offenses dismissed and “read in,” provided that the court has followed the procedures established for adult read-ins. [R.W.S. v. State \(In the Int. of R.W.S.\)](#), 162 Wis. 2d 862, 471 N.W.2d 16 (1991); see [State v. Gerard](#), 57 Wis. 2d 611, 620–21, 205 N.W.2d 374 (1973). The court lacks authority, however, to order restitution for the lost wages of a victim. [State v. B.S. \(In the Int. of B.S.\)](#), 133 Wis. 2d 136, 394 N.W.2d 750 (Ct. App. 1986); see also [J.Z. v. State \(In the Int. of J.Z.\)](#), No. 87-0261, 1987 WL 267620 (Wis. Ct. App. July 14, 1987) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)) (holding that court was without authority to order restitution for lost wages, reasonable out-of-pocket expenses for cooperating in investigation of offense, or projected rental car fee).

The analysis used by the appellate courts in construing restitution in delinquency cases under the former [Wis. Stat. § 48.34\(5\)\(a\)](#) has created a conflict. ([Wis. Stat. § 938.34\(5\)\(a\)](#) now governs restitution in delinquency cases.) In [I.V. v. State \(In the Interest of I.V.\)](#), the court of appeals declined to look to the adult restitution statute (which specifically provides for restitution for loss from unrecovered stolen property) in finding that restitution for this type of loss in delinquency cases is permissible (even though not explicitly authorized by statute). See [I.V.](#), 109 Wis. 2d 407. On the other hand, in [R.W.S. v. State \(In the Interest of R.W.S.\)](#), 156 Wis. 2d 526, 457 N.W.2d 498 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 862, 471 N.W.2d 16 (1991), both the court of appeals and the supreme court based their decisions permitting restitution for read-in offenses on the fact that restitution for read-ins occurs in adult cases and, as a general rule, serves the best interests of children. Both [I.V.](#) and [R.W.S.](#) appear to conflict with other cases holding that the juvenile court judge can order dispositions only if they are both specified in the dispositional statute and based on the needs of the particular child. Indeed, the holding in [State v. B.S.](#)—that the court cannot order restitution for lost wages—rests on that principle and, again, rejects analogies to the adult restitution statute. See [B.S.](#), 133 Wis. 2d 136.



If the restitution ordered is in the form of cash payments, the restitution order must include a determination that the juvenile alone has the ability to pay, and the order can allow the time for payment to extend until the expiration date of the order. [Wis. Stat.](#) § 938.34(5)(a). If the juvenile objects to the amount of restitution, the juvenile has a right to a restitution hearing before the court sets the amount of restitution. *Id.*

Similarly, if the form of restitution ordered is the provision of services, the restitution order must include a determination that the juvenile is physically able to perform the services; the order can allow the time for completion of the services to extend until the expiration date of the order. *Id.*

**Comment.** The juvenile court cannot order restitution for a lapsed order as a condition of a later order arising from a new delinquency adjudication. *R.L.C. v. State (In the Int. of R.L.C.)*, 114 Wis. 2d 223, 338 N.W.2d 506 (Ct. App. 1983). Several unpublished decisions have reversed restitution orders because the court failed to make a finding that the juvenile had the ability to pay the restitution ordered within 12 months. See *C.J.T. v. State (In the Int. of C.J.T.)*, No. 90-2913, 1991 WL 198161 (Wis. Ct. App. Aug. 21, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *State v. M.E.N. (In the Int. of M.E.N.)*, No. 90-0385, 1990 WL 132185 (Wis. Ct. App. July 10, 1990) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *State v. R.W. (In the Int. of R.W.)*, No. 90-0259, 1990 WL 118283 (Wis. Ct. App. June 19, 1990) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

A juvenile under 14 years of age who participates in a restitution project provided by the county can be employed or perform any duties under any circumstances allowed under [Wis. Stat.](#) ch. 103 for children 14 or 15 years old. [Wis. Stat.](#) § 938.34(5)(b). ([Wis. Stat.](#) ch. 103 regulates employment, including employment rules regarding children.) Also, a juvenile who participates in a restitution project provided by the county is not required to obtain a work permit. [Wis. Stat.](#) § 938.34(5)(b); see also [Wis. Stat.](#) § 103.70(1).

The juvenile court cannot order a juvenile under 14 years old to make more than \$250 in restitution or to perform more than 40 hours of services for the victim as restitution. [Wis. Stat.](#) § 938.34(5)(c). The court can order a juvenile, while the juvenile is placed in a juvenile correctional facility, residential care center for children and youth, or other out-of-home placement, to contribute a specified percentage of the juvenile's income, if any, toward restitution. [Wis. Stat.](#) § 938.34(5)(am).

## G. Special Treatment or Care [§ 11.30]

If the juvenile needs special treatment or care, the court can order the parents to provide such care. [Wis. Stat.](#) § 938.34(6)(a). Under [Wis. Stat.](#) § 938.02(17m), *special treatment or care* means professional services needed by a juvenile and the juvenile's family "to protect the well-being of the juvenile, prevent placement of the juvenile outside the home or meet the special needs of the juvenile." It includes medical, psychiatric, psychological, and alcohol or other drug abuse treatment, as well as any other services that the court finds "necessary and appropriate." [Wis. Stat.](#) § 938.02(17m).

If a parent fails or proves financially unable to provide the necessary care, the court can order an appropriate agency to provide the care, even if the court has not taken legal custody from the parents. [Wis. Stat.](#) § 938.34(6)(ar). The court cannot, however, order psychotropic drugs to be administered to the juvenile. *Id.*; see [Wis. Stat.](#) § 51.61(1)(g) (rights of individuals under treatment to refuse medication).

The court can order development and implementation of a coordinated services plan of care if the court report indicates that the juvenile needs such a plan, the county (or tribe, if applicable) has established a coordinated services initiative under [Wis. Stat.](#) § 46.56, and an assessment of the juvenile and the juvenile's family establishes the juvenile's eligibility for the initiative. [Wis. Stat.](#) § 938.34(6m); see also *infra* § [11.43](#).

## H. Restriction or Suspension of Driving Privileges [§ 11.31]

For certain drug offenses, the juvenile court can order suspension of a juvenile's driving privileges. See *supra* § [11.28](#). The court can also restrict or suspend the driving privileges of a juvenile "adjudicated delinquent under a violation of any law in which a motor vehicle is involved." [Wis. Stat.](#) § 938.34(14m). The court can also suspend the driving privileges of a juvenile who has made a bomb threat, see [Wis. Stat.](#) § 947.015, or who has committed certain firearm violations, see [Wis. Stat.](#) §§ 941.235, 948.605. [Wis. Stat.](#) § 938.34(14q). The court cannot restrict or suspend the driving privileges of a juvenile in a JIPS case unless the juvenile is in need of protection and services because the juvenile is a dropout or is habitually truant from school as a result of the juvenile's intentional refusal to attend school. [Wis. Stat.](#) § 938.345(2); see *infra* § [11.49](#).

## I. Forfeiture [§ 11.32]

The juvenile court can order a delinquent juvenile to pay a forfeiture of up to the maximum amount of the fine a court could impose on an adult for committing the same violation, or, if the violation applies only to a person under 18 years of age, the court may order a forfeiture of up to \$100. [Wis. Stat. § 938.34\(8\)](#). The court can order a forfeiture only after determining that this disposition serves the best interests of the juvenile and the juvenile's rehabilitation. *Id.* As with restitution orders, the court must make a finding that the juvenile alone has the ability to pay the forfeiture, and the order must allow up to 12 months to pay. *Id.*

If the juvenile fails to pay the forfeiture, the court can vacate the forfeiture and order some other disposition, or the court can suspend the juvenile's driving privileges or hunting or fishing license. *Id.* If the juvenile pays the forfeiture during the suspension, the court must reduce the length of the suspension to the period already elapsed. *Id.*

**Comment.** The statute does not specify the procedure by which the court can vacate a forfeiture and order another disposition. The statute also does not indicate how much time the court should give the juvenile to pay the forfeiture before making the decision to vacate. If the juvenile has made a good-faith effort to pay the forfeiture, but does not have the ability to pay, due process at least requires (1) notice to the juvenile that the court will vacate the order, (2) the opportunity to be heard on the issue, and (3) a dispositional hearing on the proposed new disposition.

For certain drug offenses, the court may order a child to pay a forfeiture, as provided in [Wis. Stat. § 938.34\(14s\)](#). *See supra* § 11.28.

The court cannot order payment of a forfeiture in a JIPS case. [Wis. Stat. § 938.345\(1\)\(c\)](#); *see infra* § 11.49.

## J. Supervised Work Program or Other Community Service Work [§ 11.33]

The court can order a juvenile to participate in a supervised work program or other community service work. [Wis. Stat. § 938.34\(5g\)\(a\)](#). The supervised program or other community service work must be constructive, promote the juvenile's rehabilitation, be age appropriate, and suit the juvenile's physical ability. [Wis. Stat. § 938.34\(5g\)\(b\)](#). The program must be combined with counseling. *Id.* The program cannot conflict with the juvenile's school schedule. *Id.* The amount of work required must reasonably relate to the seriousness of the offense. *Id.*

A juvenile under 14 years of age who participates in a supervised work project provided by the county or in other community service work can, for the purpose of doing court-ordered community service work, be employed or perform any duties under any circumstances allowed under [Wis. Stat. ch. 103](#) for children 14 or 15 years old. [Wis. Stat. § 938.34\(5g\)\(c\)](#). The court cannot require a juvenile under 14 years of age to perform more than 40 total hours of supervised work or community service work. [Wis. Stat. § 938.34\(5g\)\(d\)](#). A juvenile who participates in a supervised work program or other community service work is not required to obtain a work permit. [Wis. Stat. § 938.34\(5g\)\(c\)](#); *see also* [Wis. Stat. § 103.70\(1\)](#).

In a supervised work program, the juvenile either does work for reasonable compensation (reflecting the reasonable market value of the work performed) or does uncompensated community service work. [Wis. Stat. § 938.34\(5g\)\(am\)](#). The county department or a community agency approved by the court must administer the supervised work program. [Wis. Stat. § 938.34\(5g\)\(a\)](#).

Other community service work must be administered by a public agency or nonprofit charitable organization approved by the court. *Id.* The juvenile can perform other community service work in lieu of restitution when the county department, community agency, public agency, or nonprofit charitable organization and the person to whom the juvenile owes the restitution agree to the substitution. [Wis. Stat. § 938.34\(5g\)\(am\)](#).

The court can also order the juvenile to participate in a youth corps program, *see* [Wis. Stat. § 16.22\(1\)\(dm\)](#), or other community service work program, if the sponsor of the program approves the juvenile's participation in the program. [Wis. Stat. § 938.34\(5m\)](#).

Special rules may apply depending on the nature of the juvenile's offense. For instance, if the court adjudicates the juvenile as delinquent for violating a violent crime law in a school zone, *see* [Wis. Stat. § 939.632\(1\)\(d\), \(e\)](#), the court can order the juvenile to participate for 100 hours in a supervised work program or to perform 100 hours of community service work, but only if the court determines that the juvenile will not pose a threat to public safety while completing the requirement. [Wis. Stat. § 938.34\(13r\)](#).

If a juvenile age 14 or older commits an act of graffiti, in violation of [Wis. Stat. § 943.017](#), the court can require the juvenile to participate in not less than 10 hours nor more than 100 hours of a supervised work program or other community service work. [Wis. Stat. § 938.34\(13t\)](#). For a juvenile younger than 14 years old, the maximum number of hours is 40. *Id.*

If the court adjudicates a juvenile as delinquent based on a hate crime, the court can order him or her to participate in a supervised work program or other community service work. [Wis. Stat. § 938.34\(14d\)\(b\)](#).

## K. Youth Report Centers [§ 11.34]

The court can order a juvenile to report to a youth report center at any time the juvenile is not under the immediate supervision of an adult. The juvenile can be required to participate in the programming of the center, including social, behavioral, academic, and community service components. [Wis. Stat. § 938.34\(7j\)](#).

## L. Supervised Independent Living [§ 11.35]

The juvenile court can order that a juvenile at least 17 years of age be allowed to live independently, either alone or with friends, and with whatever supervision the court believes appropriate. [Wis. Stat. § 938.34\(3\)\(e\)](#). The court can order this dispositional alternative only if the juvenile has “sufficient maturity and judgment to live independently” and if whoever (or whatever agency) proposes the independent living arrangement presents a reasonable plan for supervision. *Id.* Supervised independent living does not constitute legal emancipation; the legal rights and responsibilities of the parent or guardian remain unaffected by the juvenile living independently. Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 11.5 (2d ed. 1983).

## M. Education Programs [§ 11.36]

The juvenile court has available several education programs as dispositional alternatives. The court can order a juvenile to attend a nonresidential educational program provided by the school district in which the juvenile resides. [Wis. Stat. § 938.34\(7d\)\(a\)1](#). The court can order the juvenile to attend a program for “children at risk,” as provided in [Wis. Stat. § 118.153](#). The court can also order a juvenile to attend a nonresidential educational program provided under a contract with the juvenile’s school district by (1) a licensed child welfare agency; (2) a private, nonprofit, nonsectarian agency located in the district in which the juvenile resides; (3) a technical college district located where the juvenile resides; or (4) an educational program provided by a tribal school under a contractual agreement with the school district in which the child resides. [Wis. Stat. § 938.34\(7d\)\(a\) 2.–5.](#) [Wis. Stat. §§ 48.60–48.615](#) govern the licensing and operation of child welfare agencies.

If the court orders the juvenile to attend one of these programs, the court must also order the school district to disclose the juvenile’s pupil records to the county department or agency responsible for supervising the juvenile, to monitor the juvenile’s compliance. [Wis. Stat. § 938.34\(7d\)\(b\)](#). *Pupil records*, defined in [Wis. Stat. § 118.125\(1\)\(d\)](#), include neither notes and records maintained for the teacher’s personal use nor “[r]ecords necessary for, and available only to persons involved in, the psychological treatment of a pupil.”

The statutory provisions relating to these educational programs do not apply to a juvenile who is a “child with a disability.” [Wis. Stat. § 938.34\(7d\)\(d\)](#). [Wis. Stat. § 115.76\(5\)](#) defines a *child with a disability*.

The court can also order the juvenile to participate in educational programs with a particular focus or objective. The court can, for example, order the juvenile to participate in a wilderness challenge program or other experiential education program. [Wis. Stat. § 938.34\(7g\)](#). The court can also order the juvenile to participate in an educational program designed to deter future delinquent behavior. [Wis. Stat. § 938.34\(7n\)](#). The statute refers to this dispositional alternative as the “Juvenile Offender Education Program.” The program can include sensitivity training or diversity training for a juvenile adjudicated delinquent for a hate crime. [Wis. Stat. § 938.34\(14d\)\(d\)](#); *see also* [Wis. Stat. § 939.645](#) (creating penalty enhancement for commission of hate crimes). Suggested course topics include decision making, assertiveness (instead of aggression), family and peer relationships, self-esteem, identification and expression of feelings, alcohol and other drug abuse recognition, and errors in thinking and judgment. [Wis. Stat. § 938.34\(7n\)](#).

The court can order the juvenile to participate in vocational assessment, counseling, and training if the juvenile needs such services. [Wis. Stat. § 938.34\(7r\)](#). If the court report indicates that the juvenile has specialized educational needs, the court can order him or her to participate in a day treatment program. [Wis. Stat. § 938.34\(7w\)](#).

## N. Alcohol or Drug Treatment or Education [§ 11.37]

The court can order alcohol or drug treatment or education for juveniles convicted of drug offenses. *See supra* § [11.28](#). In cases in which other types of offenses are involved, if the court report recommends that a juvenile needs drug or alcohol treatment or education, the court can order that the juvenile participate either in drug and alcohol treatment on an outpatient basis at an approved treatment facility or in an alcohol or drug abuse education program approved by the court. [Wis. Stat. § 938.34\(6r\)\(a\), \(b\)](#).

The treatment facility or entity providing the treatment must report to the agency providing services to the juvenile on whether the juvenile is cooperating with treatment and on the effectiveness of the treatment. [Wis. Stat. § 938.34\(6r\)\(a\)](#). [Wis. Stat. § 938.34\(6r\)\(a\)](#) provides that this disclosure can occur pursuant to a service agreement between the treatment facility and the agency, with the informed written consent of the juvenile 12 years old or older, or with the informed written consent of the parent of a juvenile under age 12. Similarly, an agency or person providing an education program must submit to the agency providing services to the juvenile a report on the juvenile's attendance at the program. [Wis. Stat. § 938.34\(6r\)\(b\)](#).

Parents or guardians may consent to assessment and treatment (as well as alcohol- and drug-testing) of a child without the child's consent. The parent or guardian may have the child assessed by an approved treatment facility. If the facility determines that the child needs treatment, then it must recommend a treatment plan that is the least restrictive form of treatment based on the child's needs. The parent or guardian can then approve the treatment recommendation without the child's consent. [Wis. Stat. § 51.48](#).

## O. Volunteers in Probation [§ 11.38]

A "volunteers in probation" program allows a volunteer to supervise an individual. See [Wis. Stat. § 973.11](#). The court can order a juvenile who is adjudicated delinquent for a misdemeanor to be placed with a volunteers-in-probation program (with reasonable and appropriate conditions set by the court) if the court determines that the program would likely benefit the juvenile and the community. [Wis. Stat. § 938.34\(2g\)](#). The court can choose this option only if such a program has been established in the juvenile's county of residence. *Id.*

Conditions can include a directive for the volunteer to be a role model for the juvenile and provide informal counseling and monitoring, including monitoring the juvenile's compliance with other conditions set by the court. [Wis. Stat. § 938.34\(2g\)\(a\)](#). The court can also order as conditions of probation any of the other dispositions provided in [Wis. Stat. § 938.34](#). [Wis. Stat. § 938.34\(2g\)\(b\)](#).

## P. Teen Court [§ 11.39]

If the juvenile allegedly committed a delinquent act that would be a misdemeanor if committed by an adult, and the juvenile, with the juvenile's parent, guardian, or legal custodian present, admits or pleads no contest in open court to the allegations, the court can order the juvenile placed in a teen court program. [Wis. Stat. § 938.34\(2m\)\(c\), \(b\)](#).

The juvenile court can select this disposition only if the chief judge of the judicial administrative district has approved a teen court program in the juvenile's county of residence, the juvenile court determines that participation in the program will likely benefit the juvenile and the community, and the juvenile has not successfully completed participation in a teen court program during the two years before the date of the alleged delinquent act. [Wis. Stat. § 938.34\(2m\)\(a\), \(d\)](#).

## Q. Electronic Monitoring [§ 11.40]

The court can order electronic monitoring for any juvenile under an order of supervision, under intensive supervision, in placement other than at a juvenile detention facility or juvenile portion of a county jail, in the serious juvenile offender program, or on aftercare supervision. [Wis. Stat. § 938.34\(3g\)](#). [Wis. Stat. § 938.34\(4n\)](#) governs aftercare supervision.

## R. Serious Juvenile Offender Program [§ 11.41]

A judge can place a delinquent juvenile in the serious juvenile offender program, see [Wis. Stat. § 938.34\(4h\)](#), but only if the following conditions exist:

### 1. The juvenile is

- a. Fourteen years old or older and has been adjudicated delinquent for committing or conspiring to commit a violation or attempt of a crime for which the penalty is life imprisonment, [Wis. Stat. § 939.32\(1\)\(a\)](#), felony murder, [Wis. Stat. § 940.03](#), second-degree reckless homicide, see [Wis. Stat. § 940.06](#), mayhem, [Wis. Stat. § 940.21](#), first-degree sexual assault, [Wis. Stat. § 940.225\(1\)](#), hostage-taking, [Wis. Stat. § 940.305](#), kidnapping, [Wis. Stat. § 940.31](#), tampering with household products causing the death of another, [Wis. Stat. § 941.327\(2\)\(b\)4.](#), arson of a building, [Wis. Stat. § 943.02](#), Class E burglary, [Wis. Stat. § 943.10\(2\)](#), carjacking, [Wis. Stat. § 943.23\(1g\)](#), armed robbery, [Wis. Stat. § 943.32\(2\)](#), first-degree sexual assault of a child, [Wis. Stat. § 948.02\(1\)](#), repeated sexual assault of a child, [Wis. Stat. § 948.025\(1\)](#), child abduction, [Wis. Stat. § 948.30\(2\)](#), or attempted armed robbery, [Wis. Stat. § 943.32\(2\)](#); or

- b. Ten years old or older and has been adjudicated delinquent for first-degree intentional homicide, [Wis. Stat. § 940.01](#), attempted first-degree intentional homicide, first-degree reckless homicide, [Wis. Stat. § 940.02](#), or second-degree intentional homicide, [Wis. Stat. § 940.05](#); and

2. The court finds placement in a juvenile correctional facility the only other appropriate disposition.

[Wis. Stat. § 938.34\(4h\)](#). The court must find that the juvenile meets the criteria for placement in a juvenile correctional facility under [Wis. Stat. § 938.34\(4m\)](#). [Wis. Stat. § 938.34\(4h\)\(b\)](#); *see supra* § 11.26.

**Note.** In *State v. David L.W. (In the Interest of David L.W.)*, 213 Wis. 2d 277, 570 N.W.2d 582 (Ct. App. 1997), the court held that [Wis. Stat. § 938.34\(4h\)](#) does not allow the state to impose the disposition under the serious juvenile offender program on the basis that the juvenile was adjudicated delinquent for similar offenses in other jurisdictions.

The DOC is responsible for developing the serious juvenile offender program, which must provide highly structured supervision, care, and rehabilitation that is more restrictive than ordinary supervision in the community. [Wis. Stat. § 938.538\(2\)\(a\)](#). Certain statutorily defined “component phases” must be provided to individual juveniles ordered to participate in the program.

**Note.** The DOC can provide these sanctions in any sequence, provide more than one sanction at a time, and return to a sanction previously used for a participant. [Wis. Stat. § 938.538\(3\)\(b\)](#). Although a participant does not have a right to a hearing on the sanction required (unless the department provides for a hearing by rule), the juvenile still has a right to judicial review of any dispositional alternative that is not consistent with the goals of the dispositional order, regardless of the language of [Wis. Stat. § 938.538\(3\)\(b\)](#) that seeks to limit judicial review. Thus, the juvenile can seek a revision of the dispositional order pursuant to [Wis. Stat. § 938.363\(1\)](#) and a change in placement under [Wis. Stat. § 938.357](#) if new information becomes available that “affects the advisability of the court’s dispositional order.” The court still has authority to rescind that portion of a dispositional order placing a juvenile in the serious juvenile offender program in the first instance. In addition, the legislature’s attempt to vest discretion with the department (and not the court) might violate the separation-of-powers doctrine. Under this scheme, the DOC appears to have authority to decide how long a juvenile will be incarcerated or whether the juvenile will pay restitution, sanctions that should rest with the discretion of the court.

1. A court may place a juvenile in a Type 1 juvenile correctional facility or a secured residential care center for children and youth. [Wis. Stat. § 938.538\(3\)\(a\)1](#). If the court adjudicated the juvenile delinquent for committing an act that would qualify as a Class A felony if committed by an adult, the court can place the juvenile until he or she reaches 25 years of age (subject to a mandatory minimum period of confinement of not less than one year). [Wis. Stat. § 938.538\(3\)\(a\)1m](#).
2. A juvenile can be placed in a foster home, group home, residential care center for children and youth, or secured residential care center for children and youth. [Wis. Stat. § 938.538\(3\)\(a\)1p](#).
3. A juvenile can be placed under intensive or other supervision, including community supervision under [Wis. Stat. § 938.533](#). [Wis. Stat. § 938.538\(3\)\(a\)2](#).
4. A juvenile can be monitored electronically. [Wis. Stat. § 938.538\(3\)\(a\)3](#).
5. A juvenile can be subject to alcohol or other drug abuse outpatient treatment and services or mental health treatment and services. [Wis. Stat. § 938.538\(3\)\(a\)4](#), 5.
6. A juvenile can be required to do community service, make restitution, participate in educational and employment services, or be involved in any other programs as prescribed by the department. [Wis. Stat. § 938.538\(3\)\(a\)6–9](#).

The DOC must create Type 2 juvenile correctional facilities in which to place juveniles subject to any of the third, fourth, fifth, and sixth conditions listed above. [Wis. Stat. § 938.538\(4\)\(b\)](#).

A juvenile placed in the serious juvenile offender program comes under the supervision and control of the DOC and is in custody. [Wis. Stat. § 938.538\(4\)\(a\)](#). If a juvenile violates a condition of participation in the program while in a Type 2 juvenile correctional facility, the department can, without a hearing, return the juvenile to placement in a Type 1 juvenile correctional facility or a secured residential care center for children and youth. *Id.*



The juvenile offender review program in the division of juvenile corrections can release to aftercare supervision or community supervision, *see* [Wis. Stat. § 301.03\(10\)\(d\)](#) a juvenile who has completed two years of participation in the serious juvenile offender program. [Wis. Stat. § 938.538\(5\)\(a\)](#). The DOC will provide aftercare supervision or community supervision to the juvenile. [Wis. Stat. § 938.538\(5\)\(a\)](#).

The DOC can discharge a juvenile from the program if he or she has completed three years of participation in the program. [Wis. Stat. § 938.538\(5\)\(b\)](#).

In a JIPS case, the court cannot place a juvenile in the serious juvenile offender program. [Wis. Stat. § 938.345\(1\)\(a\)](#); *see infra* [§ 11.49](#).

## S. Victim-Offender Mediation Program [§ 11.42]

The court can order a juvenile to participate in a victim-offender mediation program, if the victim of the juvenile's delinquent act agrees. [Wis. Stat. § 938.34\(5r\)](#). The court can use this dispositional alternative in any case; however, the statute specifically indicates that this disposition may be appropriate in cases in which the delinquency adjudication flows from a hate crime. [Wis. Stat. § 938.34\(14d\)\(c\)](#); *see* [Wis. Stat. § 939.645](#) (defining hate crimes). [Wis. Stat. § 938.34\(14d\)\(c\)](#) also provides apologizing to the victim as a possible disposition.

## T. Coordinated Services Plan of Care [§ 11.43]

If the court report recommends that the juvenile receive a coordinated services plan of care, and if the county (or tribe, if applicable) has established a coordinated services initiative under [Wis. Stat. § 46.56](#), the court can order an assessment of the juvenile and the juvenile's family for eligibility and appropriateness and, if they are eligible, the court can order development and implementation of such a plan. [Wis. Stat. § 938.34\(6m\)](#). [Wis. Stat. § 46.56](#) governs initiatives to provide coordinated services for children who are involved in two or more "systems of care" and their families. *See* [Wis. Stat. § 46.56\(1\)\(or\)](#) (defining *system of care* as "a public or private organization that provides specialized services for children with mental, physical, sensory, behavioral, emotional, or developmental disabilities or that provides child welfare, juvenile justice, educational, economic support, alcohol or other drug abuse, or health-care services for children").

## U. DNA Testing [§ 11.44]

[Wis. Stat. § 938.34\(15\)](#) requires the court to order DNA tests for juveniles adjudicated delinquent for a violation that would be a felony if committed by an adult or for a violation of fourth-degree sexual assault, [Wis. Stat. § 940.225\(3m\)](#), endangering safety by use of a dangerous weapon, [Wis. Stat. § 941.20\(1\)](#), lewd and lascivious behavior, [Wis. Stat. § 944.20](#), prostitution, [Wis. Stat. § 944.30\(1m\)](#), patronizing prostitutes, [Wis. Stat. § 944.31\(1\)](#), pandering, [Wis. Stat. § 944.33](#), failure to submit a biological specimen, [Wis. Stat. § 946.52](#), or exposing genitals, pubic area, or intimate parts, [Wis. Stat. § 948.10\(1\)\(b\)](#). [Wis. Stat. § 938.34\(15\)\(a\)1](#).

## V. Sex-Offender Registration [§ 11.45]

If the juvenile is adjudicated delinquent for any crime under [Wis. Stat. ch. 940](#), [Wis. Stat. ch. 944](#), or [Wis. Stat. ch. 948](#) or [Wis. Stat. §§ 942.08](#), [Wis. Stat. § 942.09](#), or [Wis. Stat. § 943.01–943.15](#), the court may order the juvenile to register as a sex offender if the court determines that the underlying conduct was sexually motivated, *see* [Wis. Stat. § 980.01\(5\)](#), and that it would be in the interest of public protection to have the juvenile report. [Wis. Stat. § 938.34\(15m\)\(am\)](#).

In determining under [Wis. Stat. § 938.34\(15m\)\(am\)1](#), whether it would be in the interest of public protection to have the juvenile report, the court may consider any of the following: (1) the ages, at the time of the violation, of the juvenile and the victim; (2) the relationship between the juvenile and the victim; (3) whether the violation resulted in bodily harm, as defined in [Wis. Stat. § 939.22\(4\)](#); (4) whether the victim suffered from a mental illness; (5) the probability that the juvenile will commit other violations; and (6) any other relevant factor. [Wis. Stat. § 938.34\(15m\)\(c\)1.–7](#).

A juvenile who is ordered to register may be required to comply with the reporting requirements for the rest of his or her life. [Wis. Stat. § 938.34\(15m\)\(d\)](#). If the juvenile was initially ordered to register as a sex offender for a violation of [Wis. Stat. § 942.09](#) ("representations depicting nudity," i.e., video voyeurism), the court may provide that the juvenile be released from the reporting requirements upon satisfying the conditions of the dispositional order imposed for the offense. [Wis. Stat. § 938.34\(15m\)\(am\)2](#).

A juvenile adjudicated delinquent for specified sex offenses must register as a sex offender, unless the court determines that the juvenile is not required to report. [Wis. Stat. § 938.34\(15m\)\(bm\)](#). The court makes this determination after a hearing on a motion made by the

juvenile. *Id.* Sex offenses under [Wis. Stat.](#) § 938.34(15m)(bm) include those contained in [Wis. Stat.](#) §§ 940.22(2) (sexual contact by therapist), 940.225(1), (2), or (3) (first-, second-, or third-degree sexual assault), 944.06 (incest), 948.02(1) or (2) (first- or second-degree sexual assault of child), 948.025 (repeated sexual assault of child), 948.05 (sexual exploitation of child), 948.055 (causing child to view or listen to sexual activity), 948.06 (incest with child), 948.07 (child enticement), 948.075 (computer use to facilitate child sex crime), 948.08 (soliciting child for prostitution), 948.085 (sexual assault of a child placed in substitute care), 948.095 (sexual assault of student by school staff or by person who works or volunteers with children), 948.11(2) (a) or (am) (Class I exposure of child to harmful material or harmful descriptions or narrations), 948.12 (possession of child pornography), 948.13 (child sex offender working with children), and 948.30 (abduction of another's child), as well as [Wis. Stat.](#) §§ 940.30 (false imprisonment) and 940.31 (kidnapping) if the victim was a minor and the juvenile was not the victim's parent.

Juveniles must register as sex offenders if they are under supervision in Wisconsin for having been adjudicated delinquent of a sex offense in another state. [Wis. Stat.](#) § 301.45(1g)(dj).

**Note.** In *State v. Cesar G. (In the Interest of Cesar G.)*, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1, the Wisconsin Supreme Court held that under [Wis. Stat.](#) § 938.34(16), the juvenile court has discretionary authority to stay the mandatory sex-offender registration requirement. The factors a court should consider are listed in [Wis. Stat.](#) §§ 938.34(15m)(c) and 301.45(1m)(e). The court's ability to stay the sex-offender registration requirement applies to all dispositional orders, not only orders for supervision.

Juveniles in JIPS cases involving sexual conduct do not have mandatory sex-offender registration. The court may order registration if it finds that the underlying conduct was sexually motivated and that registration would be in the best interest of public protection. [Wis. Stat.](#) § 938.345(3)(a).

## W. Other Dispositions [§ 11.46]

The court may simply counsel the juvenile or the parent, guardian, or legal custodian. [Wis. Stat.](#) § 938.34(1).

If the court report indicates that the juvenile needs drug treatment, the court can order drug testing for the juvenile. [Wis. Stat.](#) § 938.34(6s).

The governor can transfer a juvenile who is a citizen or national of a foreign country (with which the United States has a treaty allowing transfer of a delinquent juvenile) to the juvenile's country, if the parent, guardian, or legal custodian agrees. [Wis. Stat.](#) § 938.34(11).

If the juvenile committed a crime involving the use of computers, *see* [Wis. Stat.](#) § 943.70, the court can place restrictions on the juvenile's use of computers. [Wis. Stat.](#) § 938.34(14p).

In delinquency cases, the court must impose a \$20 delinquency-victim and witness-assistance surcharge. [Wis. Stat.](#) § 938.34(8d)(a). If a juvenile placed in a juvenile correctional facility or secured residential care center for children and youth fails to pay the surcharge, the DOC or county department must assess and collect the amount owed from the juvenile's wages or other moneys. [Wis. Stat.](#) § 938.34(8d)(c). The surcharge is in addition to any other disposition, and if it is not paid, the court can vacate the surcharge and order some other disposition, suspend the juvenile's hunting or fishing license for not less than 30 days nor more than 5 years, or suspend the juvenile's driving privileges for not less than 30 days nor more than 5 years. [Wis. Stat.](#) § 938.34(8d)(d). If the juvenile pays the surcharge during the suspension, the court must reduce the suspension to the period already elapsed. *Id.* The court cannot order payment of the surcharge in a JIPS case. [Wis. Stat.](#) § 938.345(1)(c); *see infra* § 11.49.

## X. Stays of Dispositional Orders [§ 11.47]

The court has authority to stay execution of a dispositional order, contingent on the juvenile's satisfaction of any conditions specified in the dispositional order that the court explained to the juvenile. [Wis. Stat.](#) § 938.34(16). If the juvenile allegedly violates a condition, the juvenile has a right to a hearing to determine whether the court should impose the original dispositional order, unless the juvenile waives in writing the right to a hearing. *Id.* The court must give notice of the hearing to the juvenile, the parent, guardian, or legal custodian, all parties subject to the original dispositional order, and the prosecutor at least three days before the hearing, unless all parties consent to proceed immediately with the hearing. *Id.* The court cannot impose the original dispositional order unless the court finds by a preponderance of the evidence that the juvenile violated a condition of the dispositional order. *Id.* A stayed one-year placement does not begin to run until the stay is lifted. *State v. Kendell G. (In the Int. of Kendell G.)*, 2001 WI App 95, 243 Wis. 2d 67, 625 N.W.2d 918.

## Y. Notice of Sanctions [§ 11.48]



Under the Juvenile Justice Code, a juvenile must receive notice of potential sanctions in one of two ways. At disposition, the court must explain the conditions of the dispositional order to the juvenile and advise the juvenile that if he or she fails to comply with any of the conditions, the agency, court, or prosecutor can bring a motion for sanctions against the juvenile. [Wis. Stat.](#) § 938.355(6)(a). Alternatively, the juvenile can acknowledge in writing that the juvenile has read, or has had read to him or her, the dispositional conditions and possible sanctions and that the juvenile understands those conditions and sanctions. *Id.*

The court can impose any of the following sanctions for noncompliance with a dispositional order:

1. Up to 10 days in a juvenile detention facility or juvenile portion of a county jail or in a place of nonsecure custody;

**Note.** The sanction of 10 days in a juvenile detention facility or the juvenile portion of a county jail is available only in JIPS cases under [Wis. Stat.](#) § 938.13(6) (habitual truancy). See [Wis. Stat.](#) § 938.355(6)(a), (6m).

2. Suspension of, or limitation on, the juvenile’s driving privileges or hunting or fishing license;
3. Home detention, with or without electronic monitoring;
4. Uncompensated community service work; or
5. Participation in youth report center programming.

[Wis. Stat.](#) § 938.355(6)(d)1.–5.

**Note.** The court can impose a sanction for each “incident” rather than for each “condition violation.” *State v. Ellis H. (In the Int. of Ellis H.)*, 2004 WI App 123, 274 Wis. 2d 703, 684 N.W.2d 157. See [chapter 16](#), *infra*, for more discussion of sanctions.

**Comment.** Before enactment of the Juvenile Justice Code, [Wis. Stat.](#) § 48.355(6)(a) mandated one type of notice. The court had to explain to the juvenile the conditions with which the juvenile had to comply and the possible sanctions for noncompliance. The court of appeals held the notice requirement of [Wis. Stat.](#) § 48.355(6)(a) mandatory and not delegable to someone other than the court, such as the juvenile’s attorney or social worker. *F.T. v. State (In the Int. of F.T.)*, 150 Wis. 2d 216, 441 N.W.2d 322 (Ct. App. 1989). Under the Juvenile Justice Code, however, the delivery of notice can clearly be delegated, if the juvenile signs a written acknowledgment and clearly demonstrates that the juvenile understands the conditions of the dispositional order and possible sanctions. Thus, a general “boilerplate” form would not suffice. The acknowledgment must be specific and applicable to the particular juvenile to constitute sufficient notice. See *infra* [ch. 16](#) (discussion of contempt and sanctions in juvenile cases).

## Z. Exceptions in JIPS Cases [§ 11.49]

If the court determines that a juvenile is in need of protection or services, the court can order one or more of the dispositions provided in [Wis. Stat.](#) § 938.34 (as described in sections [11.23–46](#), *supra*), with some exceptions. [Wis. Stat.](#) § 938.345(1).

In a JIPS case, the court cannot place the juvenile in the serious juvenile offender program, a juvenile correctional facility, or a secured residential care center for children and youth. [Wis. Stat.](#) § 938.345(1)(a). The court cannot order payment of a forfeiture or surcharge. [Wis. Stat.](#) § 938.345(1)(c). The court cannot restrict or suspend the juvenile’s driving privilege unless the court finds the juvenile to be in need of protection or services based on dropping out of school or habitual truancy because of the juvenile’s refusal to attend school. [Wis. Stat.](#) § 938.345(1)(d), (2). If the juvenile has dropped out of school or is habitually truant because of the juvenile’s refusal to attend school, the court can suspend the juvenile’s driving privileges for not less than 30 days nor more than one year. [Wis. Stat.](#) § 938.342(1g)(a). The court cannot place any juvenile not specifically found to be developmentally disabled or mentally ill or to be a child with a disability, see [Wis. Stat.](#) § 115.76(5), in facilities that exclusively treat children in these categories. [Wis. Stat.](#) § 938.345(1)(e). Finally, the court cannot order the juvenile into a juvenile detention facility, the juvenile portion of a county jail, or nonsecure custody. [Wis. Stat.](#) § 938.345(1)(g). [Wis. Stat.](#) § 938.34(3)(f) contains this dispositional alternative for delinquent juveniles.

## AA. Role of Defense Counsel [§ 11.50]

In general, at the dispositional stage, defense counsel investigates and proposes dispositions appropriate and acceptable to the juvenile. Defense counsel should focus primarily on the client’s wishes. See *supra* [ch. 3](#) (role of defense counsel); see also *In re Gault*, 387 U.S. 1

(1967); Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* (2014).

On the other hand, defense counsel has an obligation to advise the juvenile of realistic possible dispositions. For example, if the judge will likely not allow the juvenile to return home, defense counsel should suggest alternatives that might prove acceptable to the court and the juvenile. Defense counsel can arrange for the juvenile to make preplacement visits to facilities and programs that counsel will recommend. Melli & Hirsch, *supra* § 11.35, § 11.18, at 132 (2d ed. 1983). The juvenile can then make an informed decision about disposition. If the juvenile still wants the juvenile's attorney to argue vigorously for returning home, defense counsel must do so as the advocate for the juvenile.

At the dispositional hearing, counsel must do more than merely advise the court of the juvenile's choice of placement. Effective representation does not consist merely of objecting to the recommended disposition without presenting an alternative. Defense counsel should approach disposition with the same zeal that counsel would bring to representing a defendant in a criminal case. Thus, counsel should investigate ways to transform the juvenile's wishes into a concrete, feasible plan. For example, are any community or family resources available to monitor and supervise the juvenile if he or she can return home? Each local Public Defender's Office has information about resources available in the community, and defense counsel should not hesitate to contact that office for assistance and advice.

As noted earlier in the chapter, *see supra* § 11.9, the court report contains extensive information about the juvenile and culminates with a recommendation that can carry great weight with the court. Defense counsel should investigate possible dispositions and propose alternatives to the social worker preparing the court report.

If the social worker proves unreceptive, defense counsel might consider preparing his or her own court report, perhaps even hiring an expert to propose alternatives to the recommendations made in the court report. In exercising discretion, the court must consider those dispositional alternatives proposed. *See supra* § 11.2. If defense counsel proposes a reasonable plan that incorporates the juvenile's point of view, the court will then have other options.

Counsel should become familiar with the resources available for particular types of clients (e.g., runaway children). The more information defense counsel has about available resources, the more creative he or she can be at disposition. In addition, the resource information gathered for one case will assist in future representation of clients in juvenile court.

## V. CHIPS and UCHIPS Cases [§ 11.51]

### A. Dispositional Alternatives in CHIPS Cases and UCHIPS Cases Involving Child Expectant Mother [§ 11.52]

The court has available, in CHIPS cases and UCHIPS cases involving child expectant mothers, some of the dispositional alternatives available in delinquency cases.

The judge can order supervision. [Wis. Stat.](#) § 48.345(2), (2m); *see also supra* § 11.25. The court can order some out-of-home placements: in the home of a relative of the child, in a home that need not be licensed if placement lasts for less than 30 days, in a licensed foster home or group home, in the home of a guardian under [Wis. Stat.](#) § 48.977(2), in a second-chance group home under [Wis. Stat.](#) § 48.625(1m), or in a residential treatment center. [Wis. Stat.](#) § 48.345(3). Placement with a parent, guardian, relative, or other person who has been convicted of first- or second-degree intentional homicide of the child's parent is prohibited unless the conviction has been reversed, set aside, or vacated, or unless the prohibition is overridden by clear and convincing evidence that such placement is in the best interests of the child. [Wis. Stat.](#) § 48.345(3)(a)1., (b)1. The statutes provide similar prohibitions against placement in the home of a relative other than the parent or in the home of another person if the judge finds that the relative or person has been convicted of, has pleaded no contest to, or has had a charge dismissed or amended as a result of a plea agreement for certain specified crimes, such as sexual assault. [Wis. Stat.](#) § 48.345(3)(a)2., (b)2.

**Note.** In cases involving the out-of-home placement of an Indian child, the court must determine by clear and convincing evidence that the placement would be in the Indian child's best interests, as described in [Wis. Stat.](#) § 48.01(2). Also, the court must designate a placement for the Indian child that complies with the order-of-placement preference under [Wis. Stat.](#) § 48.028(7)(b)1.-4., unless the court finds good cause for departing from that order. [Wis. Stat.](#) § 48.345(3m).

In addition, a CASA could be designated for the child pursuant to [Wis. Stat.](#) § 48.345(2r). This CASA could gather information about the child and her living situation and present that information to the court.

The order cannot place a child who is not specifically found to be developmentally disabled or mentally ill or to be a child with a disability, *see* [Wis. Stat. § 115.76\(5\)](#), in facilities that exclusively treat those categories of children. [Wis. Stat. § 48.345](#). The judge can transfer legal custody of the child. [Wis. Stat. § 48.345\(4\)](#); *see supra* § [11.27](#). Another option is for the judge to counsel the child or parent, guardian, or legal custodian. [Wis. Stat. § 48.345\(1\)](#).

The court can order special treatment or care, [Wis. Stat. § 48.345\(6\)](#); *see supra* § [11.30](#), or supervised independent living, [Wis. Stat. § 48.345\(10\)](#); *see also supra* § [11.35](#). The court can also order the child to participate in an education program or an alcohol or other drug abuse treatment or education program. [Wis. Stat. § 48.345\(12\), \(13\)](#); *see also supra* §§ [11.36, 11.37](#).

In UCHIPS cases, a child expectant mother can be ordered into inpatient alcohol or other drug abuse treatment if, based on an assessment under [Wis. Stat. § 48.295](#) and the court report, *see* [Wis. Stat. § 48.33](#), the judge finds that the child expectant mother needs such treatment and that it is the least restrictive treatment consistent with her needs. [Wis. Stat. § 48.345\(14\)](#).

## B. Dispositional Alternatives in UCHIPS Cases Involving Adult Expectant Mother [§ 11.53]

The judge can counsel the adult expectant mother. [Wis. Stat. § 48.347\(1\)](#). The judge can also order supervision, including an order for the expectant mother to participate in mental health treatment, anger management, individual or family counseling, or prenatal development training or education. [Wis. Stat. § 48.347\(2\)](#).

The judge may also order that the adult expectant mother be placed in the home of an adult relative or friend or a community-based residential facility. [Wis. Stat. § 48.347\(3\)](#); *see* [Wis. Stat. § 50.01\(1g\)](#) (defining *community-based residential facility*). The judge may also order special treatment or care, [Wis. Stat. § 48.347\(4\)](#), alcohol or other drug abuse treatment or education, [Wis. Stat. § 48.347\(5\)](#), or inpatient alcohol or drug treatment, [Wis. Stat. § 48.347\(6\)](#). The order cannot place an expectant mother not specifically found to be developmentally disabled or mentally ill in a facility that exclusively treats people with developmental disabilities or mental illnesses. [Wis. Stat. § 48.347](#).

## C. Duty to Warn [§ 11.54]

Just as the court must explain to a juvenile in a JIPS or delinquency case the conditions of the dispositional order and must advise the juvenile of possible sanctions if the juvenile does not comply, in a CHIPS or UCHIPS case, the court must explain to a parent of a child found to be in need of protection or services or the expectant mother of an unborn child found to be in need of protection or services the possible grounds for termination of parental rights and the conditions necessary for the child or expectant mother to be returned home or for the parent to be granted visitation. [Wis. Stat. § 48.356](#). The court must give these warnings orally at the dispositional hearing and, if the order places the child or expectant mother outside the home, must include them in the dispositional order. *Id.* The court need not attach the warnings to any temporary physical custody orders, however, because such orders do not, by themselves, result in the type of out-of-home placement that can form the basis for a termination of parental rights. *Marinette Cnty. v. Tammy C. (In re Termination of Parental Rts. of Anthony C.)*, 219 Wis. 2d 206, 219–20, 579 N.W.2d 635 (1998).

**Note.** The Wisconsin Supreme Court has held that not every order placing a child outside the home must contain the written notice required in [Wis. Stat. § 48.356\(2\)](#). *St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D. (In re the Termination of Parental Rts. to Michael D.)*, 2016 WI 35, ¶ 4, [368 Wis. 2d 170](#), 880 N.W.2d 107 (“The plain language of § 48.415(2) does not require that the written notice must be in the *last* order or that six months must pass after the last order before the petition to terminate parental rights may be filed.”) (clarifying *Waukesha Cnty. v. Steven H. (In re Termination of Parental Rts. of Brittany Ann H.)*, [2000 WI 28](#), [233 Wis. 2d 344](#), [607 N.W.2d 607](#)).

The duty to warn is mandatory. *See Cynthia E. v. La Crosse Hum. Servs. Dep't (In the Int. of Jamie L.)*, [172 Wis. 2d 218](#), 493 N.W.2d 56 (1992); *M.P. v. Dane Cnty. Dep't of Hum. Servs. (In the Int. of D.P.)*, [170 Wis. 2d 313](#), 488 N.W.2d 133 (Ct. App. 1992); *Rock Cnty. Dep't of Soc. Servs. v. K.K. (In the Int. of K.K.)*, [162 Wis. 2d 431](#), 469 N.W.2d 881 (Ct. App. 1991); *D.V. v. Juneau Cnty. (In re D.F.)*, [147 Wis. 2d 486](#), 433 N.W.2d 609 (Ct. App. 1988). Failure to warn a CHIPS parent as required under [Wis. Stat. § 48.356](#) will preclude the prosecutor from meeting the burden of proof in a later proceeding for termination of parental rights based on abandonment under [Wis. Stat. § 48.415\(1\)](#) or on continuing need of protection or services under [Wis. Stat. § 48.415\(2\)](#). The warning is not required when a judgment of divorce is entered. *Kimberly S.S. v. Sebastian X.L. (In re Termination of Parental Rts. to Jillian K.L.)*, [2005 WI App 83](#), 281 Wis. 2d 261, 697 N.W.2d 476.

## D. Role of Defense Counsel [§ 11.55]

As with delinquency and JIPS dispositional hearings, for CHIPS and UCHIPS dispositional hearings defense counsel investigates and proposes alternatives, keeping in mind that the wishes of the client have primary importance.

Every CHIPS or UCHIPS case carries the potential for a future termination of parental rights. What happens at disposition in CHIPS or UCHIPS cases has significance because every condition ordered by the court with which the parent or expectant mother does not comply can serve in the future as proof of the parent's or expectant mother's unfitness.

The law of Wisconsin favors preserving the unity of the family, whenever appropriate. [Wis. Stat.](#) § 48.01(1) recognizes the importance of keeping children in permanent, safe, and stable family relationships when doing so is consistent with the child's best interest. [Wis. Stat.](#) § 48.01(1)(a), (gg). When the court places a child temporarily in foster care, the primary question is not whether the child is better off with the foster parents. Rather, the question is how the agencies responsible for providing services to the family can best accomplish reunification of the family unless circumstances make it not possible to reunite the family. *See, e.g.,* [Wis. Stat.](#) § 48.355(2d)(b). Termination of parental rights is considered as the last (and most drastic) alternative, to be ordered only after diligent efforts at reunification have failed. For an interesting discussion of the proper exercise of discretion by a juvenile court in ordering a CHIPS child returned to her biological parents, see *B.J.K. v. J.D. (In the Interest of B.J.K.)*, Nos. 91-0051, 91-0314, 1991 WL 150983 (Wis. Ct. App. June 6, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

Defense counsel must ensure the reasonableness of conditions proposed and ordered. Appropriate conditions reasonably relate to the problems identified and proved by the county. And when the court orders support services, such services should ensure that the parents are *able* to comply with the conditions. For example, parents might need assistance with setting up parenting classes or knowing who to contact for counseling. Indigent parents might need help with transportation. Some parents might need information conveyed to them directly by the social worker assigned to the case because they cannot read the letters sent to them.

As noted above, the responsible agency must make reasonable efforts to prevent the removal of the child from the home and to achieve the permanency goal of the child's permanency plan. [Wis. Stat.](#) § 48.355(2)(b)6., (2c). In addition to becoming familiar with the resources available to families, defense counsel might find it helpful to review the statutory requirements for permanency plans in developing a plan to present to the court at disposition. *See supra* §§ [11.13–15](#).

## VI. Practice Forms [§ 11.56]

The forms in this section are offered as practice guides. Always check original sources of authority for current law. When using the sample forms, also check local practice and adapt the form language to fit the client's circumstances. Note that many other juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county and online at <https://www.wicourts.gov/forms1/circuit/index.htm>. A list of those standard juvenile court forms is included in [appendix B](#), *infra*.

**A. Motion for Further Dispositional Study (Form CRM-0206) [§ 11.57]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



## MOTION FOR FURTHER DISPOSITIONAL STUDY <sup>[23]</sup>

---

1. *(Juvenile's name)*, by *(his) (her)* attorney, moves the court to order the staff to conduct further inquiry into alternatives for the disposition of *(juvenile's name)*'s case.

2. The grounds for this motion are as follows.

a. On *(date)*, *(juvenile's name)* was adjudicated delinquent by this court, and the court ordered the staff to complete a dispositional study and report pursuant to [Wis. Stat.](#) §§ 938.069 and 938.33.

b. [Wis. Stat.](#) § 938.33 requires the staff to include in the dispositional report:

(1) The social history of the juvenile.

(2) A plan of rehabilitation or treatment and care that employs the most effective means necessary to accomplish the purpose.

(3) A description of the specific services that the agency is recommending the court to order for the juvenile family.

(4) A statement of the objectives of the plan.

(5) A plan of providing educational services.

(6) If requested by the agency, a plan to provide mental health treatment, anger management, individual or family counseling, or parent education.

(7) If the plan contains a recommendation for placement outside the home, substantiation that possible plans that would permit the child to remain at home have been investigated and are contrary to the child's welfare. This substantiation should include a statement of the available alternatives that have been explored and why the explored alternatives are contrary to the child's welfare.

c. The plan the staff submitted pursuant to the court's order does not contain any explicit plan for treatment, or an explanation of alternatives to placement outside the home that have been considered and rejected, or a statement of the objectives of the plan—all this in violation of the Wisconsin statutes and the order of this court.

d. *(Juvenile's name)* believes that several alternatives to placement outside *(his) (her)* home exist as possible dispositions within the community that have not been included in the dispositional study and report. These include:

(1)

*(State possible dispositions)*

(2)

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

---



---

(Attorney's name)

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

**B. Motion for Alternative Disposition (Form CRM-0207) [§ 11.58]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_



## MOTION FOR ALTERNATIVE DISPOSITION <sup>[<4]</sup>

---

(Juvenile's name), by (his) (her) attorney, moves the court, pursuant to [Wis. Stat. § 938.335\(3\)](#), to consider an alternative dispositional study and recommendation prepared by (author's name) and presented below.

1. *(Recommendation summary)*
  - A. *(Place)*
  - B. *(Person to have custody)*
2. *(Social history)*
3. *(Alternatives explored)*
4. *(Reason for choosing the alternative recommended)*
5. *(Goals of the treatment plan)*
  - A. *(Behavior changes expected)*
  - B. *(Skills to be achieved)*
  - C. *(Time frame)*

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for (juvenile's name)

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

### STATEMENT OF AUTHOR

I, (author's name), prepared this report, an alternative dispositional study for (juvenile's name). My recommendations are based on (number) meetings with (juvenile's name). I also had conversations with the following operators of agencies considered to be possible alternatives for disposition:

1. \_\_\_\_\_  
*(Identify agencies' operators)*
2. \_\_\_\_\_

My qualifications for presenting this study and recommendation are: (state qualifications).

Dated \_\_\_\_\_

---

*(Author's name)*  
*(Author's address)*  
*(Author's telephone number)*

**C. Notice and Motion to Review Dispositional Order (Form CRM-0208) [§ 11.59]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of \_\_\_\_\_

Case No. \_\_\_\_\_

A Person Under the Age of 17 \_\_\_\_\_

---

**NOTICE AND MOTION TO REVIEW DISPOSITIONAL ORDER**

---

TO: Office of the District Attorney  
(address) \_\_\_\_\_

1. PLEASE TAKE NOTICE that (juvenile's name), by (*his*) (*her*) attorney, moves the court, pursuant to [Wis. Stat.](#) § 941.29(1)(bm), (8), for an order determining that the juvenile is not likely to act in a manner dangerous to public safety.

**[Choose appropriate alternative]**

2. This motion will be heard **[add if appropriate]** (by telephone):

BEFORE: \_\_\_\_\_ (Assigned judge)  
PLACE: \_\_\_\_\_ County Courthouse  
\_\_\_\_\_  
(Courthouse address)  
DATE: \_\_\_\_\_  
TIME: \_\_\_\_\_

**[or]**

2. This motion will be heard at a time, date, and place to be set by the court.

**[Continue]**

3. The grounds for this motion are as follows.

a. By (*his*) (*her*) conduct since the disposition in this matter, (juvenile's name) has demonstrated that (*he*) (*she*) does not present a danger to public safety.

b. On (date), (juvenile's name) entered an admission in juvenile court to the charge of (describe charge).

c. Upon (*his*) (*her*) admission, the court found (juvenile's name) to be delinquent for an act committed after April 21, 1994, that if committed by an adult in the state would be a felony.

d. The court placed (juvenile's name) on formal supervision for a period of one year. The terms of the supervision included (list terms). At the time of disposition, the court also advised (juvenile's name) that (*he*) (*she*) was prohibited from possessing a firearm under [Wis. Stat.](#) § 941.29(1m)(bm).

e. (Juvenile's name) has successfully fulfilled all terms of *(his) (her)* court-imposed supervision and was released from formal supervision on (date).

f. During and since *(his) (her)* period of formal supervision, (juvenile's name) has demonstrated, by *(his) (her)* conduct, that *(he) (she)* is not likely to act in a manner dangerous to public safety and therefore should be found fit to recover *(his) (her)* privilege of possessing a firearm legally in this state.

Therefore, (juvenile's name) requests the court to find that *(he) (she)* is not likely to act in a manner dangerous to public safety and that *(he) (she)* shall recover the privilege of legally possessing a firearm in this state under [Wis. Stat. § 941.29\(8\)](#).

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

**D. Petition for a New Hearing (Form CRM-0209) [§ 11.60]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_





## PETITION FOR A NEW HEARING <sup>[2]</sup>

(Juvenile's name), by (his) (her) attorney, petitions the court, pursuant to [Wis. Stat. § 938.46](#), to hold a new hearing on the question of the adjudication of (his) (her) status, and states:

1. On (date), this court adjudicated (juvenile's name) to be (delinquent) (in need of protection or services).
2. The primary evidentiary basis for this adjudication was (describe evidence).
3. New evidence has been found indicating that (juvenile's name) did not commit the misconduct for which (he) (she) was charged in the original petition, specifically:
  - a. \_\_\_\_\_  
(List evidence)
  - b. \_\_\_\_\_
4. The facts in this case, in light of this new evidence and in the best interests of (juvenile's name), warrant a new hearing and dismissal of the original petition.

Dated \_\_\_\_\_

(Firm/Office name)

Attorneys for (juvenile's name)

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
(Attorney's name)

(Attorney's address)

(Attorney's email address)

(Attorney's telephone number)

State Bar No. \_\_\_\_\_

### E. Motion for Continuance (Form CRM-0210) [§ 11.61]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_  
A Person Under the Age of 17

Case No. \_\_\_\_\_





## MOTION FOR CONTINUANCE <sup>[20]</sup>

---

1. (Juvenile's name), by *(his) (her)* attorney, moves the court, pursuant to [Wis. Stat. § 938.315\(2\)](#), to continue this proceeding until (date).

2. The grounds for this motion are as follows.

a. The hearing to (state purpose of hearing) in this case was scheduled to be held on (date).

b. (Juvenile's name) is unable to proceed with the hearing at that time because:

(1)

*(List reasons)*

(2)

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

[Type "Electronically signed by"  
and your name on this line]

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's email address)*

*(Attorney's telephone number)*

State Bar No. \_\_\_\_\_

## VII. [Standard Juvenile Court Forms](#)

## [§ 11.62]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number              | Ch. 48, Ch. 938, or Both?                  | Name of Form   | Purpose   |
|--------------------------|--|--|---|
| <a href="#">IW-1611T</a> | Ch. 48                                     | Dispositional order—protection or services with termination of parental rights notice (Ch. 48) Indian Child Welfare Act                    | Formal court order detailing the disposition in a CHIPS case involving a child subject to ICWA                                |
| <a href="#">IW-1720</a>  | Ch. 48/Ch. 938 (nondelinquency JIPS cases) | Summons—Indian Child Welfare Act   | Court order requiring a person to appear in court when the case involves an Indian child                                      |
| <a href="#">IW-1724</a>  | Ch. 48/Ch. 938 (nondelinquency JIPS cases) | Notice of hearing (juvenile)—Indian Child Welfare Act  | Notice informing interested persons of the scheduling of court proceedings in a case involving a child who is subject to ICWA |
| <a href="#">IW-1746T</a> | Ch. 938 (delinquency)                      | Dispositional order—protection or services with termination of parental rights notice (Ch. 938) Indian Child Welfare Act                   | Court order setting out the findings and dispositional conditions in a delinquency case involving a juvenile subject to ICWA  |
| <a href="#">JC-1611T</a> | Ch. 48                                     | Dispositional order with termination of parental rights notice with termination of parental rights notice —protection or services (Ch. 48) | Formal court order detailing the disposition in a CHIPS case with TPR warnings  |
| <a href="#">JD-1720</a>  | Both                                       | Summons  | Court order requiring a person to appear in court   |
| <a href="#">JD-1724</a>  | Both                                       | Notice of hearing (juvenile)   | Notice informing individuals involved in a case of a scheduled court proceeding   |
| <a href="#">JD-1745T</a> | Ch. 938                                    | Dispositional order—delinquent—with termination of parental rights notice  | Court order setting out the findings and dispositional conditions in a delinquency case                                       |
| <a href="#">JD-1746T</a> | Ch. 938                                    | Dispositional order—protection or services —with termination of parental rights notice (Ch. 938)   | Court order setting out the findings and dispositional conditions in a JIPS case  |
| <a href="#">JD-1747</a>  | Ch. 938                                    | Dispositional order—civil law/ ordinance violation   | Formal order of the court detailing the disposition in a civil law or ordinance case  |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|--------------------------|----------------------------------|---|--|
| <a href="#">JD-1749</a>  | Ch. 938                          | Acknowledgment of dispositional conditions and sanctions (delinquency/JIPS) | Statement signed by juvenile indicating an understanding of the dispositional conditions, the possible sanctions for a violation, and an understanding of the caseworker's ability to take the juvenile into custody for 72 hours while investigating a possible violation |
| <a href="#">JD-1750A</a> | Ch. 938                          | Request to impose stayed delinquency disposition order                      | Form to allow juvenile to waive the right to a hearing when the supervising agency is asking to have the court lift a stay of a dispositional order  |
| <a href="#">JD-1750B</a> | Ch. 938                          | Order to impose stayed delinquency dispositional order                      | Court's order to lift a stay of a dispositional order  |
| <a href="#">JD-1751</a>  | Ch. 938                          | Teen court referral   | Court order referring a juvenile to a teen court program   |
| <a href="#">JD-1753</a>  | Both                             | Notice concerning grounds to terminate parental rights                      | Notice to a parent or expectant mother of the possible grounds for termination of parental rights when a child or expectant mother or juvenile is placed outside the home or a parent is denied visitation rights  |
| <a href="#">JD-1755</a>  | Ch. 938                          | Notice to school district to transfer records                               | Notice to the school district that a juvenile has been transferred to a juvenile facility or a secured residential care center for children and youth so that the pupil records can be transferred   |
| <a href="#">JD-1756</a>  | Ch. 938                          | Acknowledgment of dispositional conditions and sanctions (habitual truancy) | Acknowledgment signed by a juvenile indicating an understanding of the sanctions available to the court for a violation of a dispositional order and the authority of the social worker to order a 72-hour hold  |
| <a href="#">JD-1757</a>  | Ch. 938                          | Notice of right to seek postdisposition relief                              | Notice to inform juvenile after disposition of the right to seek postdisposition relief, and to document that the juvenile's lawyer has counseled the defendant about seeking postdisposition relief   |
| <a href="#">JD-1758</a>  | Ch. 938                          | Notice of intent to enter civil judgment for restitution or forfeiture      | Notice to the juvenile and the parent(s) of the intent of the court to issue an order for judgment for unpaid restitution or forfeiture amounts  |
| <a href="#">JD-1759</a>  | Ch. 938                          | Petition for judgment against juvenile/parent for unpaid restitution        | Request by victim or insurer to have a restitution order converted into a judgment that can be docketed against the juvenile and parent(s)   |
| <a href="#">JD-1760</a>  | Ch. 938                          | Petition for judgment against juvenile/parent for unpaid forfeiture         | Request by representative of public interest, supervising agency, or law enforcement agency that issued citation to juvenile to have a forfeiture converted into a judgment that can be docketed against the juvenile and parent(s)  |



| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose  |
|--------------------------|---------------------------|--|--|
| <a href="#">JD-1761</a>  | Ch. 938                   | Judgment for unpaid restitution/ forfeiture  | Court order granting a judgment for either restitution or forfeiture   |
| <a href="#">JD-1762</a>  | Both                      | Order for recoupment of costs of legal services  | Court order directing the parent(s) to reimburse the State Public Defender for attorney fees and expenses  |
| <a href="#">JD-1763A</a> | Both                      | Public Defender response concerning recoupment   | State Public Defender's response to a parent's request for an indigency determination  |
| <a href="#">JD-1763B</a> | Both                      | Order concerning recoupment  | Court order concerning a parental request for an indigency determination   |
| <a href="#">JD-1775</a>  | Both                      | Order terminating consent decree/dispositional order                                     | Court order ending a consent decree or dispositional order in a case and closing the file  |
| <a href="#">JD-1780</a>  | Ch. 938                   | Petition to expunge court record of adjudication/<br>Recommendation of district attorney | Request by juvenile after age 17 to have the juvenile court record expunged; recommendation by district attorney supporting or objecting to juvenile's request                     |
| <a href="#">JD-1781</a>  | Ch. 938                   | Order concerning petition to expunge court record of adjudication                        | Order by court granting or denying a request to expunge court record of juvenile's adjudication of delinquency and, if granted, directing the juvenile clerk to expunge the record |
| <a href="#">JG-1605</a>  | Ch. 48                    | Petition for appointment of guardian (§ 48.977)  | Petition to court to appoint guardian for person under the age of 18 pursuant to <a href="#">Wis. Stat. § 48.977</a>   |
| <a href="#">JG-1606</a>  | Ch. 48                    | Dispositional order appointing guardian (§ 48.977)                                       | Court order granting or denying petition to appoint a guardian for a person under the age of 18 pursuant to <a href="#">Wis. Stat. § 48.977</a>                                    |

## Supplement Chapter 12

---

### Postdispositional Proceedings

---

Book sections supplemented: [12.1](#), [12.11](#), [12.21](#), [12.29](#), [12.30](#), and [12.39](#)

#### 12.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the Wisconsin Administrative Code are current through rules promulgated in Wis. Admin. Reg., Sept. 2024, No. 825; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024).

## 12.11 [Change in Placement] [Request by Party Responsible for Implementing Dispositional Order] [Placement of Delinquent Juveniles in Juvenile Correctional Facilities and Secured Residential Care Centers for Children and Youth] In General

[Page 11: Added third paragraph to Note at end of section](#)

An unpublished court of appeals decision has held that a youth placement under the serious juvenile offender program statute was lawful despite that the Type 1 juvenile correctional facilities no longer exist in a legal sense. The court reasoned that because Lincoln Hills and Copper Lake continue to operate as Type 1 juvenile correctional facilities, placements at those facilities remain lawful. *State v. J.A.J. (In the Int. of J.A.J.)*, [No. 2022AP2066](#), [2023 WL 7544852](#) (Wis. Ct. App. Nov. 14, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review denied).

## 12.21 [Change in Placement] Expiration of Change-in-Placement Order

[Page 19: Amended citation at end of first paragraph in section](#)

A change in placement cannot extend the expiration date of the original dispositional order except in cases in which the child's placement is changed from in the home to outside the home. In those cases, the court may extend the expiration date of the original dispositional order to the latest of the following dates, unless the court specifies a shorter period: (1) the date that is one year after the date on which the change-in-placement order is granted; (2) the date on which the child attains 18 years of age; (3) the child's 19th birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time in a secondary school or its vocational or technical equivalent and is reasonably expected to complete the schooling before the child attains 19 years of age; or (4) the child's 21<sup>st</sup> birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time in secondary school or its vocational or technical equivalent and if an individualized education program is in effect for the child. [Wis. Stat.](#) §§ 48.357(6), 938.357(6). This section does not apply, however, to juveniles whose placement is changed from in the home to a juvenile correctional facility or secured residential care center for children and youth. See [Wis. Stat.](#) § 938.357(6), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice) (providing that extensions are permitted when change is from in-home placement to placement in foster home, group home, residential care center for children and youth, home of relative who is not a parent, home of like-kin, or supervised independent living arrangement).

## 12.29 [Extension of Dispositional Order] Hearing on Request for Extension

[Pages 25–26: Amended second-to-last textual sentence and accompanying citation in second-to-last paragraph in section](#)

An extended dispositional order must comply with [Wis. Stat.](#) § 48.355 or [Wis. Stat.](#) § 938.355. See [Wis. Stat.](#) §§ 48.365(2m)(a)1m., 938.365(2m)(a)1m. If the extension continues the child in the child's home, relates to an unborn child of an adult expectant mother, or involves a juvenile placed in a Type 2 residential care center for children and youth, a juvenile correctional facility, a secured residential care center for children and youth, the serious juvenile offender program, or aftercare supervision (or community supervision), the order must run for a specified period not exceeding one year after the date on which the order is entered. [Wis. Stat.](#) §§ 48.365(5), 938.365(5); see also [Wis. Stat.](#) § 938.34(4d), (4h), (4m), (4n). If the extension continues the placement of a child in an out-of-home placement, the order must run for a specified period of time not to extend beyond the latest of the following dates: (1) the date on which the child attains 18 years of age; (2) the date that is one year after the date on which the order is granted; (3) the child's 19<sup>th</sup> birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time at a secondary school or its vocational or technical equivalent and the child is reasonably expected to complete the program before the child attains 19; or (4) the child's 21<sup>st</sup> birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time in secondary school or its vocational or technical equivalent and if an individualized education program is in effect for the child. [Wis. Stat.](#) §§ 48.365(5), 938.365(5). (For JIPS or delinquent juveniles, the out-of-home placement includes only a foster home, a group home, a residential care center for children or youth, the home of a relative other than a parent, the home of like-kin, or a supervised independent living arrangement. [Wis. Stat.](#) § 938.365(5), as amended by 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice.) When an extended order is in effect during the litigation of a petition seeking to terminate parental rights or during the appeal of an order granting or denying termination of parental rights (TPR), the extended order remains in effect until all proceedings relating to the petition or the appeal have concluded. [Wis. Stat.](#) §§ 48.368, 938.368.

## 12.30 Permanency Hearing

[Page 27: Amended first textual sentence and accompanying citation in first paragraph after first Note in section](#)

At least 30 days before the hearing, the court or agency must give the following parties notice of the time, place, and purpose of the hearing, of the issues to be determined at the hearing, and of the parties’ right to be heard: the child; the child’s parent, guardian, and legal custodian; the child’s foster parent, the operator of the facility in which the child lives, or the relative or like-kin with whom the child lives; and, if the child is an Indian child or a juvenile subject to [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) and is placed outside the home of a parent or an Indian custodian, the Indian custodian and tribe. [Wis. Stat.](#) §§ 48.38(5m)(b), 938.38(5m)(b), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). The court or agency also must notify the child’s counsel, the child’s guardian ad litem, the child’s court-appointed special advocate, the agency that prepared the permanency plan, the child’s school, the representative of the public, and, if the child is an Indian child who is placed outside the home of his or her parent or Indian custodian, the Indian child’s Indian custodian and tribe, of the time, place, and purpose of the hearing, the issues to be determined at the hearing, and the fact that they may have an opportunity to be heard at the hearing. [Wis. Stat.](#) §§ 48.38(5m)(b), 938.38(5m)(b). The notice to the child’s school must also include the name and contact information for the assigned caseworker or social worker. [Wis. Stat.](#) §§ 48.38(5m)(b), 938.38(5m)(b).

[Pages 27–28: Amended first two textual sentences and accompanying citation in second paragraph after first Note in section](#)

A child, parent, guardian, legal custodian, foster parent, operator of a facility, relative, or like-kin who receives notice of the hearing has a right to be heard by submitting written comments not less than 10 working days before the hearing or by participating at the hearing. [Wis. Stat.](#) §§ 48.38(5m)(c)1., 938.38(5m)(c)1., *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice). (While a foster parent, an operator of the facility in which the child lives, and a relative or like-kin with whom a child lives are entitled to notice and have a right to be heard at the hearing, they do not become parties to the proceeding on that basis.) The counsel, guardian ad litem, court-appointed special advocate, agency, school, or person representing the interests of the public who receives notice of the hearing may have an opportunity to be heard at the hearing by submitting written comments not less than 10 working days before the hearing or by participating at the hearing. [Wis. Stat.](#) §§ 48.38(5m)(c)1., 938.38(5m)(c)1. In certain circumstances, the court must consult with the child, in an age-appropriate and developmentally appropriate manner, regarding the child’s permanency plan and any other matters the court finds appropriate; if the circumstances do not support such a consultation with the child, the court may permit the child’s caseworker, counsel, or guardian ad litem to make a written or oral statement during the hearing, or to submit a written statement before the hearing, expressing the child’s wishes, goals, and concerns regarding the permanency plan and other appropriate matters. [Wis. Stat.](#) §§ 48.38(5m)(c)2., 938.38(5m)(c)2. If the permanency goal of the child’s permanency plan is placement in a planned permanent living arrangement that includes an appropriate, enduring relationship with an adult, then the agency that prepared the permanency plan must present specific information to the court showing that the agency made intensive and ongoing efforts to return the child home or to place the child for adoption, with a guardian, or with a fit and willing relative, but those efforts have proved unsuccessful. [Wis. Stat.](#) §§ 48.38(5m)(c)3., 938.38(5m)(c)3. At least five days before the hearing, the agency that prepared the permanency plan must file the plan with the court along with any comments it received. The plan must also be provided to the child’s parent, guardian, and legal custodian, the prosecutor, the child’s counsel or guardian ad litem, the court-appointed special advocate, and the Indian custodian or tribe of an Indian child or an Indian juvenile under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) who has been placed outside the home. [Wis. Stat.](#) §§ 48.38(5m)(d), 938.38(5m)(d).

12.39 Standard Juvenile Court Forms

[Page 34: Amended Name of Form and Purpose description for Form JD-1766 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|-------------|---------------------------|--|---|
| JD-1766     | Both                      | Request to change placement/revise dispositional order | Request to change the placement of the child/juvenile or revise the dispositional order |

Chapter 12

---

Postdispositional Proceedings

---

I. [Scope of Chapter](#)  
[§ 12.1]

The Wisconsin Children’s Code ([Wis. Stat.](#) ch. 48) and the Wisconsin Juvenile Justice Code ([Wis. Stat.](#) ch. 938) specifically provide the means by which either the court or the supervising department (with notice given to the court) can modify dispositional orders. Some proposed modifications require a hearing. Other modifications can occur administratively.<sup>1</sup>

This chapter discusses revisions and extensions of dispositional orders in cases of a child in need of protection or services (CHIPS), an unborn child in need of protection or services (UCHIPS), a juvenile in need of protection or services (JIPS), and delinquency, as well as changes in placement in these types of cases. This chapter also discusses review by the Department of Corrections of the placement of delinquent juveniles under its supervision and examines issues relating to community supervision—i.e., the juvenile counterpart to parole in the criminal system—including revocation of community supervision.

## II. Nature of Postdispositional Hearings [§ 12.2]

Postdispositional proceedings must comport with due process and provide fair treatment. As in dispositional hearings, fundamental fairness serves as the touchstone for the applicable due-process standard. *D.H. v. State (In the Int. of D.H.)*, 76 Wis. 2d 286, 296–97, 251 N.W.2d 196 (1977) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971)).

The rules of evidence do not bind the court or parties at hearings on petitions seeking revisions or extensions of dispositional orders, trial reunifications, or changes in placement. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). However, the court must admit all evidence having reasonable probative value. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). The court must “apply the basic principles of relevancy, materiality and probative value” in deciding whether to admit evidence on questions of fact. [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). The court must exclude irrelevant evidence, see [Wis. Stat.](#) § 904.02, evidence more prejudicial than probative, see [Wis. Stat.](#) § 904.03, repetitious evidence, see *id.*, or evidence otherwise inadmissible under [Wis. Stat.](#) § 901.05 (HIV test results). [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b). The court cannot admit hearsay evidence that does not have “demonstrable circumstantial guarantees of trustworthiness.” [Wis. Stat.](#) §§ 48.299(4)(b), 938.299(4)(b).

Generally, neither the Children’s Code nor the Juvenile Justice Code articulates the burden of proof at postdispositional hearings, although specific burdens apply in cases of children subject to the Indian Child Welfare Act (ICWA). See, e.g., [Wis. Stat.](#) §§ 48.357(2v) (a)4., 938.357(2v)(a)4. (requiring certain findings to be supported by clear and convincing evidence when a change-in-placement order removes a child from the home of a parent or Indian custodian). However, because these hearings concern proposed changes to the disposition, the burden of proof that applied at disposition applies here: the party seeking the change must prove by the greater weight of the credible evidence that a basis exists for the change. See *S.D.S. v. Rock Cnty. Dep’t of Soc. Servs. (In the Int. of T.M.S.)*, 152 Wis. 2d 345, 357, 448 N.W.2d 282 (Ct. App. 1989) (stating burden of proof at CHIPS dispositional hearing).

## III. Revision of Dispositional Order [§ 12.3]

[Wis. Stat.](#) § 48.363 governs revisions of dispositional orders in CHIPS and UCHIPS cases not involving changes in placement or trial reunifications, while [Wis. Stat.](#) § 938.363 governs these revisions in JIPS and delinquency cases. Under these statutes, a child, the expectant mother, the unborn child’s guardian ad litem, a parent, guardian, or legal custodian, any person or agency bound by the dispositional order, the prosecutor, or the court can propose a revision of a dispositional order in CHIPS, UCHIPS, JIPS, or delinquency cases, and an Indian custodian may request a revision in a CHIPS or UCHIPS case or in a JIPS case under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7). [Wis. Stat.](#) §§ 48.363(1), 938.363(1). In addition, defense counsel will sometimes request a revision involving a change in one of the conditions of the dispositional order. See generally [chapter 11, supra](#), for a discussion of dispositional alternatives that the juvenile court can order in CHIPS, UCHIPS, JIPS, and delinquency proceedings. The court cannot prospectively prohibit a parent from seeking a revision to any provision in a CHIPS order that imposes conditions on the parent for regaining physical placement of a child. *State v. Alice H. (In re Paternity of Shalynda S.J.)*, 2000 WI App 228, ¶ 33, 239 Wis. 2d 194, 619 N.W.2d 151.

Venue for revision proceedings lies in the county where the dispositional order was issued, unless before the proceeding the court of that county determined that proper venue for the proceeding lies in another county and transferred the case, along with all appropriate records, to that other county. [Wis. Stat.](#) §§ 48.185(4), 938.185(2).

The request or proposal for revision must explain in detail the nature of the proposed revision and “what new information is available” that “affects the advisability of the court’s disposition.” [Wis. Stat.](#) §§ 48.363(1)(a), 938.363(1)(a).

**Comment.** In an unpublished decision, the court of appeals held that *new information* does not have the same meaning as “newly discovered evidence.” Consequently, case law interpreting statutes permitting relief from judgments on the basis of newly discovered evidence does not offer guidance. *M.J.S. v. Jacobson (In the Int. of S.S.)*, No. 82-1721, 1983 WL 161797 (Wis. Ct. App. Feb. 23, 1983)

(unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In *M.J.S.*, the court held that a father’s allegation that he did not understand the basis for transferring custody of his child constituted new information. The parent filed the request for revision during the pendency of the original dispositional order because he had lacked legal representation throughout the CHIPS proceeding. The court of appeals held that the juvenile court erred in not granting the parent a hearing on his request for revision. The appellate court did not conclude that the parent had shown grounds for revision, holding only that the parent had a right to a hearing on his request. *Id.*

Whether requesting a revision or challenging a request for revision, defense counsel should be aware of the standard for a legally sufficient request for revision. Although a request for revision does not rise to the level of a formal petition and therefore need not comply with the requirements of [Wis. Stat.](#) § 48.255 or [Wis. Stat.](#) § 938.255, a request must contain new information that arguably would call into question the efficacy of the existing dispositional order. Counsel must also be aware of the special provisions of ICWA, whether the child is subject to that act, and of the appropriate parties who must be notified as the action proceeds. In general, this requires notice to the parent, Indian custodian, and tribe. See generally 25 [U.S.C.](#) §§ 1901–1963; [Wis. Stat.](#) §§ 48.028, 938.028. Special provisions also ensure that, at various stages of court proceedings, the unborn child of an expectant mother must be notified via the unborn child’s guardian ad litem.

If the request satisfies the statutory standard, the court must hold a hearing unless all parties, in writing, waive the hearing and the court approves the waivers. [Wis. Stat.](#) §§ 48.363(1)(a), 938.363(1)(a). Parties entitled to notice under [Wis. Stat.](#) §§ 48.363(1)(b) and 938.363(1)(b) include the child, the child’s parent, guardian, legal custodian, or Indian custodian, the child’s foster parent or physical custodian, the child’s court-appointed special advocate, any person or agency bound by a dispositional order, the expectant mother, the unborn child through the unborn child’s guardian ad litem, and the district attorney or corporation counsel in the county in which the dispositional order was entered. In addition, if the child is an Indian child placed outside the home of a parent, then the parent or Indian custodian and the tribe (if known) must also be notified. The court must provide notice to these parties at least three days before a hearing. [Wis. Stat.](#) §§ 48.363(1)(b), 938.363(1)(b). The notice must include a copy of the request for revision. [Wis. Stat.](#) §§ 48.363(1)(b), 938.363(1)(b). A revision cannot extend the effective period of the dispositional order. [Wis. Stat.](#) §§ 48.363(1)(b), 938.363(1)(b).

At the hearing, the requesting party bears the burden of proving by the greater weight of the credible evidence that “new information ... affects the advisability of the court’s disposition.” See [Wis. Stat.](#) §§ 48.363(1)(a), 938.363(1)(a). Any party may present evidence relevant to the revision. [Wis. Stat.](#) §§ 48.363(1m), 938.363(1m). In addition, any foster parent or other physical custodian has a right to make a written or oral statement relevant to the revision. [Wis. Stat.](#) §§ 48.363(1m), 938.363(1m).

## IV. Change in Placement [§ 12.4]

### A. In General [§ 12.5]

[Wis. Stat.](#) § 48.357 governs changes in placement of children and expectant mothers subject to dispositional orders in CHIPS and UCHIPS cases, while [Wis. Stat.](#) § 938.357 governs changes in placement of juveniles subject to dispositional orders in JIPS and delinquency cases.

Under both statutes, the person or agency responsible for implementing the dispositional order, the district attorney, or the corporation counsel can request a change in placement regardless of whether the requested change is authorized in the dispositional order. [Wis. Stat.](#) §§ 48.357(1), 938.357(1). The child, the child’s counsel or guardian ad litem, the parent, guardian, legal custodian, the expectant mother, or the unborn child’s guardian ad litem can also request a change in placement. [Wis. Stat.](#) §§ 48.357(2m), 938.357(2m). An Indian custodian may request a change in placement in a CHIPS or UCHIPS case or in a JIPS case under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7). The basis for a change in placement under [Wis. Stat.](#) § 48.357 or [Wis. Stat.](#) § 938.357 depends, in part, on which entity makes the request. The procedural requirements vary depending on the type of placement requested and whether the original dispositional order authorized the change.

**Note.** In an unpublished decision, the court of appeals held that foster parents have standing as legal custodians to bring a petition to change placement under [Wis. Stat.](#) § 48.357 and have standing to oppose a request for change in placement as well. *S.S. v. S.E. (In the Int. of M.B.S.)*, Nos. 86-2262, 87-0294, 1987 WL 267610 (Wis. Ct. App. July 23, 1987) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). [Wis. Stat.](#) § 48.357(1) and (2m) and [Wis. Stat.](#) § 938.357(1) and (2m) require that notice of a change in placement be sent to the foster parent, or other physical custodian. [Wis. Stat.](#) §§ 48.357(2r) and 938.357(2r) also provide that those physical custodians have a right to make a written statement at or before the hearing or an oral statement at the hearing, although those statutes further provide that a foster parent or physical custodian “does not become a party to the proceeding on which the hearing is held solely on the basis of receiving that notice and right to be heard.” [Wis. Stat.](#) §§ 48.357(2r), 938.357(2r).

### B. Request by Party Responsible for Implementing Dispositional Order [§ 12.6]



## 1. CHIPS, UCHIPS, JIPS, and Delinquency Cases [§ 12.7]

### a. Change in Placement from One Out-of-Home Placement to Another Out-of-Home Placement or to In-Home Placement [§ 12.8]

If the child is placed outside the child's home and the proposed change in placement would continue the child in an out-of-home placement or place the child back in the home, the agency responsible for implementing the order or the prosecutor must provide notice to the child, the child's counsel or guardian ad litem, the child's parent, guardian, or legal custodian, Indian custodian and tribe, any foster parent or other physical custodian, any court-appointed special advocate, and, in UCHIPS cases, the expectant mother and the unborn child's guardian ad litem. [Wis. Stat.](#) §§ 48.357(1)(am)1.a., 938.357(1)(am)1. (Under [Wis. Stat.](#) §§ 48.357(2r) and 938.357(2r), if the change in placement would remove a child from a foster home or other placement with a physical custodian, the foster parent or physical custodian has a right to make a written or oral statement at a change-in-placement hearing or may submit a written statement before the hearing.) If the proposed change in placement involves an adult expectant mother, the prosecutor must provide notice to the adult expectant mother, the physical custodian of the adult expectant mother, and the unborn child's guardian ad litem. [Wis. Stat.](#) § 48.357(1)(am)1.b. The notice must contain (1) the name and address of the proposed new placement, (2) the reasons for the change in placement, (3) information about whether the new placement is certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, (4) a statement describing why the new placement is preferable to the present placement, and (5) a statement of how the new placement satisfies the objectives of the treatment plan or permanency plan ordered by the court at disposition. [Wis. Stat.](#) §§ 48.357(1)(am)1.c., 938.357(1)(am)1.; *see also* [Wis. Stat.](#) §§ 48.357(1)(am)1g., 938.357(1)(am)1g. (providing requirements applicable in case of Indian child removed from home of parent or Indian custodian). The person sending the notice must file the notice with the court on the same day that the notice is sent. [Wis. Stat.](#) §§ 48.357(1)(am)1.c., 938.357(1)(am)1.

The party receiving this notice of the requested change bears the burden of filing an objection within 10 days after the notice is sent to that person and filed with the court. [Wis. Stat.](#) §§ 48.357(1)(am)2., 938.357(1)(am)2. Filing the objection entitles the party to a hearing on the request before the court can order any change in placement. [Wis. Stat.](#) §§ 48.357(1)(am)2., 938.357(1)(am)2. A court-appointed special advocate, however, cannot obtain a hearing. [Wis. Stat.](#) § 48.357(1)(am)2.

The court cannot order a change in placement within the 10-day period for filing an objection unless written waivers are signed by (1) the parent, guardian, legal custodian, or Indian custodian, the child (if 12 years of age or older), and the child's tribe, if the child is an Indian child who has been removed from the parent's or Indian custodian's home; or, (2) in UCHIPS cases, (a) the child expectant mother (if 12 years of age or older), her parent, guardian, legal custodian, or Indian custodian, the unborn child's guardian ad litem, and the child expectant mother's tribe, if the expectant mother is an Indian child who has been removed from the home, or (b) an adult expectant mother and the unborn child's guardian ad litem. [Wis. Stat.](#) §§ 48.357(1)(am)2., 938.357(1)(am)2. If the court holds a hearing, the person or agency seeking the change bears the burden of showing by the greater weight of the credible evidence a basis for the proposed change in placement.

If a proposed change in placement results in placing a child in a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, the responsible agency must submit the standardized assessment and the recommendation of the qualified individual who conducted that assessment to the court and to all persons who are required to receive the notice no later than the filing of that notice or, if not then available, no later than 10 days after the notice is filed. [Wis. Stat.](#) §§ 48.357(1)(am)1m., 938.357(1)(am)1m. An exception to this timeline applies if good cause is shown for not having the information available within 10 days, in which case the responsible agency can submit the required information within 30 days after the change in placement. [Wis. Stat.](#) §§ 48.357(1)(am)1r., 938.357(1)(am)1r. The submission must include information about all of the following:

1. Whether the proposed placement will provide the child with the most effective and appropriate level of care in the least restrictive environment;
2. How the placement is consistent with the child's short-term and long-term goals, as specified in the permanency plan;
3. The reasons why the child's needs can or cannot be met by the child's family or in a foster home (a shortage or lack of foster homes is not an acceptable reason for determining that the child's needs cannot be met in a foster home);
4. The placement preference of the family permanency team under [Wis. Stat.](#) § 48.38 or 938.38(3m) and, if that preference is not the placement recommended by the qualified individual, why that recommended placement is not preferred.

[Wis. Stat.](#) §§ 48.357(1)(am)1m., 938.357(1)(am)1m.

If a change in placement was authorized in the original dispositional order, the placement can be made immediately as long as notice is given to all persons entitled to notice. [Wis. Stat.](#) §§ 48.357(1)(am)2m., 938.357(1)(am)2m. A hearing need not be held for such changes in placement unless a person receiving notice objects and alleges that new information is available that affects the advisability of the dispositional order. [Wis. Stat.](#) §§ 48.357(1)(am)2m., 938.357(1)(am)2m.

**Note.** If the original dispositional order provides for a change in placement, the party seeking to challenge the placement bears the burden of demonstrating the “inadvisability” of the placement.

If emergency conditions require that a child or expectant mother be removed immediately from his or her current out-of-home placement, the person or agency primarily responsible for implementing the dispositional order can place the child or expectant mother elsewhere before providing the notice under [Wis. Stat.](#) § 48.357(1)(am)1. or [Wis. Stat.](#) § 938.357(1)(am)1. or the required consent under [Wis. Stat.](#) § 48.357(1)(am)2r. or [Wis. Stat.](#) § 938.357(1)(am)2r. [Wis. Stat.](#) §§ 48.357(2)(a)1., 938.357(2)(a)1. Placement may include a licensed public or private shelter care facility as a transitional placement for not more than 20 days. [Wis. Stat.](#) §§ 48.357(2)(c), 938.357(2)(c). However, the person or agency must send the notice to the statutorily required parties within 48 hours after the emergency change in placement. [Wis. Stat.](#) §§ 48.357(2)(a)1., 938.357(2)(a)1. The notice must contain (1) the name and address of the new placement, (2) the reasons for the change in placement, (3) information about whether the placement is certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, (4) a statement describing why the change is preferable to the present placement, and (5) a statement of how the new placement satisfies the treatment plan or permanency plan ordered by the court. [Wis. Stat.](#) §§ 48.357(1)(am)1., (2), 938.357(1)(am)1., (2). Any person receiving the notice may obtain a hearing on the matter by filing an objection with the court within 10 days after receipt of the notice. [Wis. Stat.](#) §§ 48.357(1)(am)2., 938.357(1)(am)2. If the child is between 18 and 21 years old and a full-time student at a secondary school or its vocational or technical equivalent, and if an individualized education program is in effect for the child, then the child or the child’s guardian on behalf of the child must consent to the change in placement. [Wis. Stat.](#) §§ 48.357(1)(am)2r., 938.357(1)(am)2r. No hearing is required for a change in placement under [Wis. Stat.](#) § 48.357(1)(am)2r. or [Wis. Stat.](#) § 938.357(1)(am)2r.

**Comment.** The Wisconsin Supreme Court has held that invocation of the emergency procedures of [Wis. Stat.](#) § 48.357 does not deprive foster parents of their right to a hearing under [Wis. Stat.](#) § 48.64(4)(a). *Bingenheimer v. Department of Health & Soc. Servs.*, 129 Wis. 2d 100, 383 N.W.2d 898 (1986). The court held, however, that a [Wis. Stat.](#) § 48.64(4)(a) hearing serves not as a forum for challenging the child’s removal, but as a mechanism for considering only “issues affecting the person as head of a foster home,” such as expunging the foster parent’s file of erroneous materials related to the removal of the child. *Id.* at 110.

When an emergency compels a change in placement for a child placed outside the home, any party receiving notice can demand a hearing. [Wis. Stat.](#) §§ 48.357(2)(a), 938.357(2)(a). In an unpublished decision, the court of appeals held that a CHIPS dispositional order containing a provision for the future emergency removal of the child “if the living situation becomes dangerous to [the child’s] safety and well-being” was invalid to the extent that it made findings in advance of the event to which the findings related. *State v. Christine M.M. (In the Int. of Marissa M.)*, No. 92-2800, 1993 WL 172564 (Wis. Ct. App. May 25, 1993) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

**Comment.** [Wis. Stat.](#) §§ 48.357(2)(a)1. and 938.357(2)(a)1. provide that a party receiving notice can demand a hearing “under sub. (1)(am)2.” Because [Wis. Stat.](#) §§ 48.357(1)(am)2. and 938.357(1)(am)2. require a party wishing a hearing to file an objection with the court within 10 days after notice is sent to that party and filed with the court, [Wis. Stat.](#) §§ 48.357(2)(a)1. and 938.357(2)(a)1. might require defense counsel (or any other party) to demand a hearing by filing an objection within 10 days after notice is sent to the parties and filed with the court.

If an emergency change in placement results in placing a child in a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, the responsible agency must submit the standardized assessment and the recommendation of the qualified individual who conducted that assessment to the court and to all persons who are required to receive the notice no later than the filing of that notice or, if not then available, no later than 10 days after the notice is filed. [Wis. Stat.](#) §§ 48.357(2)(a)2., 938.357(2)(a)2. *But see* [Wis. Stat.](#) §§ 48.357(2)(a)3., 938.357(2)(a)3. (allowing submission within 30 days if good cause shown for not having information available within 10 days). The submission must include the same information set forth in [Wis. Stat.](#) §§ 48.357(1)(am)1m., 938.357(1)(am)1m., as identified *supra*.

In addition, within 60 days after an emergency change in placement, the court must issue an order containing a finding as to each of the following:



1. Whether the needs of the child can be met through placement in a foster home;
2. Whether placement of the child in a residential care center for children and youth, a group home, or a shelter care facility certified under [Wis. Stat. § 48.675](#) provides the most effective and appropriate level of care for the child in the least restrictive environment;
3. Whether the placement is consistent with the child's short-term and long-term goals, as specified in the permanency plan; and
4. Whether the court approves or disapproves the placement.

[Wis. Stat. §§ 48.357\(2\)\(a\)4., \(2v\)\(a\)5., 938.357\(2\)\(a\)4., \(2v\)\(a\)5.](#) In making these findings, the court must consider the standardized assessment and the recommendation of the qualified individual who conducted that assessment. [Wis. Stat. §§ 48.357\(2\)\(a\)4., 938.357\(2\)\(a\)4.](#) The answers to these questions do not affect whether the placement can be made. [Wis. Stat. §§ 48.357\(2\)\(a\)4., 938.357\(2\)\(a\)4.](#)

### **b. Change in Placement from In-Home Placement to Out-of-Home Placement [§ 12.9]**

If the child is placed in the child's home and the proposed change in placement would place the child outside the home, the person or agency responsible for implementing the order or the prosecutor must submit a written request for the change in placement to the court. [Wis. Stat. §§ 48.357\(1\)\(c\)1., 938.357\(1\)\(c\)1.](#) The request must contain the following information: (1) the name and address of the proposed new placement, (2) the reasons for the change in placement, (3) a statement describing why the new placement is preferable to the present placement, and (4) a statement of how the new placement satisfies the objectives of the treatment plan or permanency plan ordered by the court at disposition. [Wis. Stat. §§ 48.357\(1\)\(c\)1., 938.357\(1\)\(c\)1.; see also Wis. Stat. §§ 48.357\(1\)\(c\)1m., 938.357\(1\)\(c\)1m.](#) (providing requirements applicable in case of Indian child removed from home of parent or Indian custodian). The request must also include information showing that continued placement of the child in his or her home would be contrary to the child's welfare and specific information showing that the agency responsible for implementing the dispositional order has made reasonable efforts to prevent removal of the child from the child's home, while assuring that the child's health and safety are paramount. [Wis. Stat. §§ 48.357\(1\)\(c\)1., 938.357\(1\)\(c\)1.](#) If one of the circumstances specified in [Wis. Stat. § 48.355\(2d\)\(b\)1.–5.](#) or [Wis. Stat. § 938.355\(2d\)\(b\)1.–4.](#) (i.e., the parent has subjected the child to "aggravated circumstances," such as abandonment, torture, chronic abuse, or sexual abuse; the parent has committed certain specified crimes, such as attempted homicide, against a child of the parent; the parent has committed certain specified crimes, such as sexual assault, resulting in great bodily harm or substantial bodily harm against the child or another child of the parent; the parent has committed child trafficking against a child of the parent; the parental rights of the parent to another child have been involuntarily terminated; or, under [Wis. Stat. ch. 48](#), the parent relinquished custody of the child when the child was 72 hours old or younger) applies, then the court need not make findings related to the agency's efforts to prevent removal of the child from the home.

If a proposed change in placement would place the child in a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program under [Wis. Stat. § 48.675](#), the responsible agency must submit the standardized assessment and the recommendation of the qualified individual who conducted that assessment to the court and to all persons who are required to receive notice, no later than the filing of the change-in-placement request or, if not then available, no later than 30 days after the date on which the placement was made. [Wis. Stat. §§ 48.357\(1\)\(c\)1r., 938.357\(1\)\(c\)1r.](#)

Before ordering any change in placement, the court must hold a hearing. [Wis. Stat. §§ 48.357\(1\)\(c\)2., 938.357\(1\)\(c\)2.](#) At least three days before the hearing, notice of the hearing and the request for change in placement must be provided to the child, the child's counsel or guardian ad litem, the parent, guardian, and legal custodian of the child, the person or agency primarily responsible for implementing the dispositional order, the district attorney or corporation counsel, any foster parent or other physical custodian, the child's court-appointed special advocate, and, if the child is an Indian child, the Indian custodian and tribe. [Wis. Stat. §§ 48.357\(1\)\(c\)2., 938.357\(1\)\(c\)2.](#) If all parties consent, the court may proceed immediately with the hearing, [Wis. Stat. §§ 48.357\(1\)\(c\)2., 938.357\(1\)\(c\)2.,](#) subject to additional notice requirements in the case of an Indian child, [Wis. Stat. §§ 48.357\(1\)\(c\)2r., 938.357\(1\)\(c\)2r.](#)

If the court orders a child removed from the home, and if the parents are present at a hearing under [Wis. Stat. § 48.357](#) or [Wis. Stat. § 938.357](#), they must give the names and other identifying information of three relatives or other people over the age of 18 whose homes the parents request the court consider as placements, unless that information has previously been provided. If the parents do not provide that information at or before the hearing, the county department (or the Department of Children and Families (DCF) in a [Wis. Stat. ch. 48](#) proceeding in Milwaukee County) or the agency responsible for implementing the order must allow the parents to provide that information later. [Wis. Stat. §§ 48.357\(1\)\(c\)2m., 938.357\(1\)\(c\)2m.](#)

If the child has one or more siblings as defined in [Wis. Stat. § 48.38\(4\)\(br\)1.](#) or [Wis. Stat. § 938.38\(4\)\(br\)1.,](#) who have been placed outside the home or for whom a change in placement outside the home is requested, the change-in-placement order must include a finding as to whether the responsible department or agency has made reasonable efforts to place the child and the sibling group together, unless the

court determines that a joint placement would be contrary to the safety or well-being of the child or any of the siblings. If the court makes this latter determination against joint placement, it must order the department or agency to make reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and the siblings, unless the court determines that such visitation or interaction would be contrary to the safety or well-being of the child or any of those siblings. [Wis. Stat.](#) §§ 48.357(2v)(a)2m., 938.357(2v)(a)2m.

In UCHIPS cases, *see* [Wis. Stat.](#) § 48.133, the court cannot change the placement of an expectant mother whose placement is in her home to a placement outside her home unless the court finds that the expectant mother is refusing or has refused to accept any alcohol or other drug abuse services offered to her or is not making or has not made a good-faith effort to participate in such services that have been offered to her. [Wis. Stat.](#) § 48.357(5r).

If emergency conditions require that a child or expectant mother be removed immediately from the home to an out-of-home placement, the person or agency primarily responsible for implementing the dispositional order can remove the child or expectant mother without first requesting a change in placement under [Wis. Stat.](#) § 48.357(1)(c)1. or 938.357(1)(c)1. [Wis. Stat.](#) §§ 48.357(2)(b)1., 938.357(2)(b)1. The person or agency that removed the child must immediately notify the court by the most practical means. As soon as possible after that notice, the court must schedule a hearing, and the person or agency that removed the child or expectant mother must notify the child; the child's counsel or guardian ad litem; the child's parent, guardian, and legal custodian; the person or agency primarily responsible for implementing the dispositional order; the district attorney or corporation counsel; any foster parent or other physical custodian; the child's court-appointed special advocate under [Wis. Stat.](#) ch. 48; and, if the child is an Indian child, the Indian child's Indian custodian and tribe. [Wis. Stat.](#) §§ 48.357(2)(b)2., 938.357(2)(b)2. By the time of the hearing, the person or agency primarily responsible for implementing the dispositional order, the district attorney, or the corporation counsel must file a request for change in placement with the court. [Wis. Stat.](#) §§ 48.357(2)(b)3., 938.357(2)(b)3. For further details on the hearing and the necessary findings, see [Wis. Stat.](#) §§ 48.357(2)(b)3.–6. and 938.357(2)(b)3.–6.

## 2. Placement of Delinquent Juveniles in Juvenile Correctional Facilities and Secured Residential Care Centers for Children and Youth [§ 12.10]

### a. [In General](#) [§ 12.11]

If the proposed change in placement involves placing a juvenile in a juvenile correctional facility or secured residential care center for children and youth, the court must hold a hearing unless the juvenile, parent, guardian, and legal custodian waive it. [Wis. Stat.](#) § 938.357(3).

The person or agency seeking the change must provide notice to the juvenile; the juvenile's counsel or guardian ad litem; the juvenile's parent, guardian, or legal custodian; the juvenile's foster parent, or other physical custodian; and, in the case of an Indian juvenile who has been removed from a parent's or Indian custodian's home under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), the juvenile's Indian custodian and tribe. [Wis. Stat.](#) § 938.357(1)(am)1., (3). The notice must contain (1) the name and address of the new placement, (2) the reasons for the change, (3) a statement describing why the new placement is preferable to the present placement, (4) a statement of how the new placement satisfies the objectives of the treatment plan or permanency plan ordered by the court, and (5) whether the new placement is certified under [Wis. Stat.](#) § 48.675. [Wis. Stat.](#) § 938.357(1)(am)1. The person sending the notice must file the notice with the court on the same day that the notice is sent. *Id.* If an Indian juvenile has been removed from the home under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), and the new placement moves the juvenile to another placement outside the home, the notice must also contain a statement as to whether the placement complies with the order of placement preference under [Wis. Stat.](#) § 938.028(6)(a) or (b) or, if it does not, the notice must contain specific information showing good cause for departing from that order. [Wis. Stat.](#) § 938.357(1)(am)1g.

The juvenile is entitled to counsel at the hearing, and any party may present relevant evidence and cross-examine witnesses. [Wis. Stat.](#) § 938.357(3).

As with any other discretionary circuit court decision, a court must base its decision to change placement on the evidence presented. When the court orders a juvenile placed in a juvenile correctional facility or secured residential care center for children and youth, however, the court must also find that the conditions for correctional placement under [Wis. Stat.](#) § 938.34(4m) have been met. [Wis. Stat.](#) § 938.357(3). Specifically, the court must find that (1) the juvenile has been found delinquent for an offense punishable, if committed by an adult, by a sentence of six months or more; (2) the juvenile needs restrictive custodial treatment; and (3) the juvenile poses a danger to the public. [Wis. Stat.](#) § 938.34(4m). The court cannot place a juvenile in a juvenile correctional facility or a secured residential care center for children and youth unless these three conditions exist at the time of the change in placement.

**Comment.** In an unpublished decision, the court of appeals reversed an order transferring a delinquent juvenile to a secured correctional facility when the juvenile court failed to make a finding that the juvenile posed a danger to the public at the time of the original disposition for criminal damage to property and when the evidence showed only that she was uncontrollable, not that she presented a current danger to society. *V.L.H. v. State (In the Int. of V.L.H.)*, No. 79-1723, 1980 WL 99598 (Wis. Ct. App. Apr. 4, 1980) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In *V.L.H.*, the prosecutor sought the child's transfer to Lincoln Hills under former [Wis. Stat.](#) § 48.363, which allowed transferring custody to the former Department of Health and Social Services. [Wis. Stat.](#) § 938.363, the current revision statute in the Juvenile Justice Code, does not permit revisions that involve changes in placement under [Wis. Stat.](#) § 938.357. However, because the current change-in-placement statute also requires a finding of dangerousness before effecting transfer to a juvenile correctional facility or secured residential care center for children and youth, the reasoning by the court of appeals in the *V.L.H.* case remains persuasive. See [Wis. Stat.](#) §§ 938.357(3), 938.34(4m).

In *V.L.H.*, the court explained that legislative changes abolishing uncontrollability as a status offense (i.e., an offense that brings an individual within juvenile court jurisdiction but that otherwise would not be a crime) demonstrated that the legislature did not intend to authorize placement in a secured correctional facility (now a juvenile correctional facility) when juveniles prove unwilling to accept offered treatment. *V.L.H.*, 1980 WL 99598, at \*5.

A court need not make a finding of continued dangerousness to extend the disposition of a juvenile placed at a juvenile correctional facility pursuant to a finding of dangerousness at the original dispositional hearing. *R.E.H. v. State (In the Int. of R.E.H.)*, 101 Wis. 2d 647, 305 N.W.2d 162 (Ct. App. 1981). Presumably, a finding of continued dangerousness is not required to extend an order for placement of a juvenile in a secured residential care center for children and youth.

Juveniles placed in secured residential care centers for children and youth or Type 2 juvenile correctional facilities, see [Wis. Stat.](#) § 938.02(20), remain under the supervision of the Department of Corrections, fall under the authority of the department's rules and discipline, and are considered to be in custody. [Wis. Stat.](#) § 938.357(4)(am); see [Wis. Stat.](#) § 946.42(1)(a) (defining *custody*).

**Note.** 2017 Wis. Act 185 restructured juvenile correctional placements in Wisconsin. The legislation originally set January 1, 2021, or the date that all juveniles are transferred from the Type 1 juvenile correctional facility at Copper Lake and Lincoln Hills Schools (whichever is earlier), as the deadline for the DOC to establish new Type 1 juvenile correctional facilities for serious juvenile offender placements, and for counties or Indian tribes to establish additional secured residential care centers for children and youth. 2019 Wis. Act 8 extended that deadline to July 1, 2021. The opening of these new facilities and the closing of Copper Lake and Lincoln Hills Schools will add another level of more restrictive or less restrictive changes in placement, because juveniles may have their placement changed from a Type 1 juvenile correctional facility and a secured residential care center for children and youth.

As of the date of publication of this edition of the *Wisconsin Juvenile Law Handbook*, the deadlines for construction of secured residential care centers for children and youth that were authorized by 2017 Wis. Act 185 have been surpassed. See also 2019 Wis. Act 8. Although 2021 Wis. Act 252 has authorized the state to contract additional debt for the purpose of constructing a new Type 1 juvenile correctional facility in Milwaukee County and the Department of Corrections has announced a site selection for that facility, attorneys should be alert to ongoing developments with this construction. Because the state has not met the legislatively set deadlines, attorneys might want to challenge the validity of placement at current Type 1 juvenile correctional facilities at Copper Lake or Lincoln Hills Schools if the placement is not consistent with current Wisconsin law.

## b. Departmental Review [§ 12.12]

The Department of Corrections must conduct its own review of juveniles placed under its supervision. This departmental review takes place in delinquency cases, whether the juvenile came under the department's supervision at the time of the original dispositional hearing or at a postdispositional hearing. See [Wis. Stat.](#) § 938.50. A departmental review consists of an examination to determine which placement best suits the juvenile and best protects the public. *Id.* The Department of Corrections can use any public or private facilities to assist in determining the best placement for the juvenile. *Id.* [Wis. Stat.](#) § 938.50 requires that the examination include an investigation of the juvenile's environment and personal and family history, as well as any physical and mental examinations the department deems necessary. *Id.*

If the court has ordered a delinquent juvenile placed in a juvenile correctional facility or a secured residential care center for children and youth, the department can release the juvenile to aftercare or community supervision either immediately or after a period of confinement to the facility or institution if the department concludes, after departmental review, that release will best suit the juvenile and protect the public. [Wis. Stat.](#) § 938.357(4)(am), 938.50.

## c. Transfer to More Restrictive Placement [§ 12.13]

Juveniles placed in Type 2 juvenile correctional facilities or Type 2 residential care centers for children and youth may be transferred to a more restrictive placement under [Wis. Stat. § 938.357\(4\)\(b\)1.](#) and 2. The Department of Corrections may transfer, without a hearing, a juvenile placed in a Type 2 juvenile correctional facility, *see* [Wis. Stat. § 938.02\(20\)](#), to a Type 1 juvenile correctional facility, *see* [Wis. Stat. § 938.02\(19\)](#), or (with the consent of the operating entity) to a secured residential care center for children and youth, *see* [Wis. Stat. § 938.02\(15g\)](#), if the juvenile violates a condition of the juvenile's placement in the Type 2 juvenile correctional facility. [Wis. Stat. § 938.357\(4\)\(b\)1.](#) Such a transfer can take place only after the Department of Corrections has consulted with the child welfare agency that operates the Type 2 juvenile correctional facility. *Id.*

The county department may also transfer, without a hearing, a juvenile placed in a Type 2 residential care center for children and youth, *see* [Wis. Stat. §§ 938.02\(19r\), 938.34\(4d\)](#), to a secured residential care center for children and youth if the juvenile violates a condition of the juvenile's placement in the Type 2 residential care center for children and youth. [Wis. Stat. § 938.357\(4\)\(b\)2.](#) Further, the placement in a secured residential care center for children and youth (from a Type 2 residential care center for children and youth) can last no more than 10 days. *Id.*

Although a hearing is not required to make the above placements, the child welfare agency that is operating the Type 2 juvenile correctional facility or Type 2 residential care center for children and youth must notify, in writing, the parent, guardian, legal custodian, county department, and committing court of the placements. [Wis. Stat. § 938.357\(4\)\(b\)3.](#)

**Note.** Notice to the juvenile's counsel is not required because no hearing is needed under the statute.

A juvenile who has been placed, under [Wis. Stat. § 938.357\(4\)\(b\)1.](#) or 2., in a more restrictive placement may seek review of the decision of the Department of Corrections or the county department only by the common-law writ of certiorari. [Wis. Stat. § 938.357\(4\)\(b\)4.](#)

#### **d. Transfer to Less Restrictive Placement [§ 12.14]**

Juveniles placed in Type 2 juvenile correctional facilities or Type 2 residential care centers for children and youth may be transferred to a less restrictive placement under [Wis. Stat. § 938.357\(4\)\(c\)1.](#) and 2. If it appears that a less restrictive placement is appropriate for a juvenile placed in a Type 2 juvenile correctional facility, the Department of Corrections, after consultation with the child welfare agency that is operating the Type 2 juvenile correctional facility, may transfer the juvenile to a less restrictive placement. [Wis. Stat. § 938.357\(4\)\(c\)1.](#) No hearing is necessary. *Id.* The department may also return the juvenile to the Type 2 juvenile correctional facility without a hearing. *Id.*

Further, a juvenile placed in a Type 2 residential care center for children and youth may be transferred by the child welfare agency that operates the institution to a less restrictive placement if it appears that a less restrictive placement is appropriate and if the supervising county department agrees to the transfer. [Wis. Stat. § 938.357\(4\)\(c\)2.](#) The child welfare agency may also, with the agreement of the supervising county department, return the juvenile to the Type 2 residential care center for children and youth without a hearing. *Id.*

**Comment.** The statutes stand silent as to when a juvenile can be returned to either a Type 2 juvenile correctional facility or a Type 2 residential care center for children and youth. In particular, the statutes do not specify that the juvenile must violate a condition of the less restrictive placement before the juvenile can be returned, without a hearing, to the Type 2 juvenile correctional facility or the Type 2 residential care center for children and youth.

[Wis. Stat. § 938.357\(4\)\(c\)3.](#) requires the child welfare agency operating the Type 2 juvenile correctional facility or Type 2 residential care center for children and youth to notify, in writing, the parent, guardian, legal custodian, county department, and committing court of any change in placement under [Wis. Stat. § 938.357\(4\)\(c\)1.](#) or 2.

A juvenile who has been placed under [Wis. Stat. § 938.357\(4\)\(c\)1.](#) or 2. may seek review only by the common-law writ of certiorari. [Wis. Stat. § 938.357\(4\)\(c\)4.](#)

#### **e. Release to Aftercare or Community Supervision [§ 12.15]**

Aftercare or community supervision refers to the supervision of a delinquent juvenile either following release from a juvenile correctional facility or secured residential care center for children and youth or after the Department of Corrections' placement of the juvenile on such supervision pursuant to a [Wis. Stat. § 938.50](#) departmental review. *See generally* [Wis. Admin. Code](#) ch. DOC 393. The department or a county agency supervises the juvenile on such supervision until the juvenile's commitment term expires. [Wis. Admin. Code](#) § DOC 393.03(3).



**Note.** The Juvenile Justice Code’s references to the corrective sanctions program (and many references to aftercare) have generally been replaced with references to juvenile “community supervision.” See 2015 Wis. Act 55, § 9408.

**Note.** As of the date of publication of this edition of the *Wisconsin Juvenile Law Handbook*, the deadlines for construction of secured residential care centers for children and youth that were authorized by 2017 Wis. Act 185 (setting deadline of no later than January 1, 2021) have been surpassed. See also 2019 Wis. Act 8 (extending deadline to July 1, 2021). Although 2021 Wis. Act 252 has authorized the state to contract additional debt for the purpose of constructing a new Type 1 juvenile correctional facility in Milwaukee County and the Department of Corrections has announced a site selection for that facility, attorneys should be alert to ongoing developments with this construction. Because the state has not met the legislatively set deadlines, attorneys might want to challenge the validity of placement at current Type 1 juvenile correctional facilities at Copper Lake or Lincoln Hills Schools if the placement is not consistent with current Wisconsin law.

If the court originally orders the juvenile placed with the Department of Corrections, the department has the authority to place the juvenile in a juvenile correctional facility or (with the consent of the operating entity) a secured residential care center for children and youth or on aftercare or community supervision, either immediately or after the juvenile has spent some time in a juvenile correctional facility or secured residential care center for children and youth. [Wis. Stat.](#) § 938.357(4)(am). This authority exists even when, at the time of the original disposition, the court orders a juvenile placed in a juvenile correctional facility or secured residential care center for children and youth.

The Department of Corrections must send written notice of the change in placement to the parent, guardian, legal custodian, designated county department, and committing court. [Wis. Stat.](#) § 938.357(4)(am). In the case of a juvenile who has received a correctional placement under [Wis. Stat.](#) § 938.34(4m), a dispositional order will designate one of the following to provide aftercare supervision: the county department of the county of the court that placed the juvenile in a juvenile correctional facility or secured residential care center for children and youth, or the county department of the juvenile’s county of residence. [Wis. Stat.](#) § 938.34(4n). [Wis. Stat.](#) § 938.51 identifies other individuals and agencies that the Department of Corrections or county department, whichever has supervision of the juvenile, must notify of the juvenile’s imminent release.

The Department of Corrections must “try” to release a juvenile to community supervision and the county department with supervision of a juvenile must “try” to release the juvenile to aftercare supervision under [Wis. Stat.](#) § 938.357(4) within 30 days after determining the juvenile’s eligibility. [Wis. Stat.](#) § 938.357(4m).

## **f. Revocation of Aftercare Supervision or Community Supervision [§ 12.16]**

Juveniles released on aftercare supervision or to community supervision remain under the supervision of the Department of Corrections until discharge or until the term of their commitment expires. If a juvenile fails to comply with the conditions of aftercare or community supervision, the department of corrections can revoke the juvenile’s status. [Wis. Stat.](#) § 938.357(5)(a), (e).

Because aftercare and community supervision equate with parole as used in criminal law, certain due-process rights attach to revocation proceedings.

**Note.** In *State ex rel. Bernal v. Hershman*, 54 Wis. 2d 626, 630, 196 N.W.2d 721 (1972), the Wisconsin Supreme Court held the term *liberty under supervision* synonymous with *parole*. The term “liberty under supervision,” which the legislature deleted from the statute when [Wis. Stat.](#) § 48.51 was repealed in 1977, is synonymous with the subsequently adopted term “aftercare” (and, more recently, “community supervision”). Indeed, the term “after care” appears in the *Hershman* decision to describe liberty under supervision.

A juvenile facing revocation of community supervision has a due-process right to an administrative hearing and, before the hearing, notice of the juvenile’s rights and a timely statement of the reasons the department seeks revocation. *Id.* at 631. The notice qualifies as timely if it provides the juvenile and counsel sufficient opportunity to prepare for the hearing.

At the hearing, the juvenile has the right to counsel, [Wis. Stat.](#) § 938.357(5)(c), the right to present and cross-examine witnesses, and the right to present a defense. *Hershman*, 54 Wis. 2d at 631. Pending aftercare revocation, a juvenile can be held in custody only as provided in [Wis. Stat.](#) §§ 938.19–.21 and [Wis. Stat.](#) § 938.355(6d)(b). [Wis. Stat.](#) § 938.357(5)(b). A juvenile on “community-supervision” status can be taken into custody only as provided in [Wis. Stat.](#) §§ 938.19–.21 or [Wis. Stat.](#) § 938.533(3)(a). [Wis. Stat.](#) § 938.357(5)(b). See also generally [supra](#) [ch. 5](#).

## **g. Length of Supervision [§ 12.17]**

For a juvenile placed in a juvenile correctional facility or a secured residential care center for children and youth under [Wis. Stat. § 938.34\(4d\)](#) or (4m), supervision may be for two years or until the juvenile turns 18 years old, whichever is earlier. [Wis. Stat. § 938.355\(4\)\(b\)](#). The court may, however, specify a shorter period of time or terminate the order sooner. *Id.* If the applicable order does not specify a termination date, it will apply for one year after the date on which the order is granted or until the juvenile turns 18 years old, whichever is earlier, unless the court terminates the order sooner. *Id.*

For a juvenile placed in the serious juvenile offender program, see [Wis. Stat. §§ 938.34\(4h\)](#), 938.538; see also *supra* [ch. 11](#) (dispositional hearings), supervision must run either for five years for a juvenile adjudicated delinquent for committing a Class B or C felony or until the juvenile's 25th birthday for a juvenile adjudicated delinquent for committing a Class A felony. [Wis. Stat. § 938.355\(4\)\(b\)](#).

Extensions of orders to a juvenile correctional facility, secured residential care center for children and youth, the serious juvenile offender program, or aftercare supervision (or community supervision) made before the juvenile turns 17 must end after one year unless the court specifies a shorter time or terminates the order sooner. *Id.*; see also [Wis. Stat. § 938.34\(4d\)](#), (4h), (4m), (4n). If the juvenile is 17 years old or older when the original order expires, the order cannot be extended. [Wis. Stat. § 938.355\(4\)\(b\)](#).

[Wis. Stat. § 938.53](#) requires the Department of Corrections to discharge delinquent juveniles under its supervision as soon as the department determines that it need not continue to supervise the juvenile because of a “reasonable probability that departmental supervision is no longer necessary for the rehabilitation and treatment of the juvenile. or for the protection of the public.”

### C. Request by Party Primarily Bound by Dispositional Order [§ 12.18]

The child, the child's counsel or guardian ad litem, the parent, guardian, legal custodian, or Indian custodian of the child, the expectant mother, or the unborn child's guardian ad litem may request a change in placement or the Indian juvenile's Indian custodian in a JIPS case under [Wis. Stat. § 938.13\(4\)](#), (6), (6m), or (7) may request a change in placement. [Wis. Stat. §§ 48.357\(2m\)\(a\)1.](#), 938.357(2m)(a)1. If the proposed change involves a child who is between 18 and 21 years old who is a full-time student at a secondary school or its vocational or technical equivalent, and if an individualized education program is in effect for the child, then only the child, the child's guardian on behalf of the child, or the agency primarily bound by the dispositional order may request a change in placement. No hearing is required under [Wis. Stat. § 48.357\(2m\)\(bv\)](#) or [Wis. Stat. § 938.357\(2m\)\(bv\)](#) if written waivers of objection to the proposed change in placement are signed by the child, the guardian of the child, and all parties bound by the dispositional order. [Wis. Stat. §§ 48.357\(2m\)\(bv\)](#), 938.357(2m)(bv). A request for change in placement must contain the name and address of the proposed placement. [Wis. Stat. §§ 48.357\(2m\)\(a\)1.](#), 938.357(2m)(a)1. As with requests for revision, the request must state the new information that affects the advisability of the current placement. [Wis. Stat. §§ 48.357\(2m\)\(a\)1.](#), 938.357(2m)(a)1. In addition, if the proposed placement would place a child who is currently in his or her home to a placement outside the child's home, the request must contain specific information showing that continued placement of the child in the home would be contrary to the child's welfare and, unless one of the circumstances in [Wis. Stat. § 48.355\(2d\)\(b\)1.-5.](#) or [Wis. Stat. § 938.355\(2d\)\(b\)1.-4.](#) applies, see *supra* [§ 12.9](#), specific information showing the agency responsible for implementing the dispositional order has made reasonable efforts to prevent removal of the child from the home. [Wis. Stat. §§ 48.357\(2m\)\(a\)1.](#), 938.357(2m)(a)1.; see also [Wis. Stat. §§ 48.357\(2m\)\(am\)](#), 938.357(2m)(am) (providing requirements applicable in case of Indian child removed from home of parent or Indian custodian).

If a change in placement results in the child being placed in a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program under [Wis. Stat. § 48.675](#), the responsible agency must submit the standardized assessment and the recommendation of the qualified individual who conducted that assessment to the court and to all persons who are required to receive notice, no later than the filing of that request or, if not then available, no later than 30 days after the date on which the placement was made. [Wis. Stat. §§ 48.357\(2m\)\(a\)2.](#), 938.357(2m)(a)2.

**Comment.** Sometimes defense counsel might request a change in placement on a client's behalf. For example, in delinquency cases, defense counsel might request release of a client from a juvenile correctional facility to a less restrictive placement; transfer of the client from one group home to another; or return of the client home from a current placement outside the home. In CHIPS cases, defense counsel might request on behalf of a parent that the child be returned home or placed with a relative instead of a foster home. If defense counsel requests more than a change in placement, however, he or she must also request a revision of the dispositional order.

The court *must* hold a hearing before any change in placement requested or proposed if the request states new information that affects the advisability of the current placement. A hearing is not required when the requested or proposed change in placement does not involve a change in placement of a child placed in the home to a placement outside the home, *and* all parties receiving notice sign written waivers of objection to the proposed placement, *and* the court approves. [Wis. Stat. §§ 48.357\(2m\)\(b\)1.](#), 938.357(2m)(b)1. A signed, written waiver from the court-appointed special advocate is not necessary, however. [Wis. Stat. § 48.357\(2m\)\(b\)1.](#) If the court holds a hearing, the court

must notify the parties of the hearing not less than three days before the hearing, unless all parties consent to proceed immediately with the hearing. [Wis. Stat.](#) §§ 48.357(2m)(b)2., 938.357(2m)(b)2., subject to additional notice requirements in the case of an Indian child, [Wis. Stat.](#) §§ 48.357(2m)(br), 938.357(2m)(br). Persons entitled to notice are the child; the child's counsel or guardian ad litem; child's parent, guardian, and legal custodian; the person or agency primarily responsible for implementing the dispositional order; the district attorney or corporation counsel; any foster parent or other physical custodian of the child; the child's court-appointed special advocate; the expectant mother; the unborn child's guardian ad litem; and, if the child is an Indian child, the Indian child's Indian custodian and tribe. [Wis. Stat.](#) §§ 48.357(2m)(b)2., 938.357(2m)(b)2. The court must attach to the notice of hearing a copy of the request or proposal for a change in placement. [Wis. Stat.](#) §§ 48.357(2m)(b)2., 938.357(2m)(b)2.

**Comment.** In *Winnebago County v. K.R. (In the Interest of A.R.)*, No. 89-1517-FT, 1990 WL 42649 (Wis. Ct. App. Jan. 10, 1990) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), the court of appeals held that when the juvenile court on its own motion requests a change in placement, the court must either give the parties three days' notice of the hearing on change in placement or obtain consent of the parties to an immediate hearing. The appellate court in this case found error when the juvenile court had ordered sua sponte, without prior notice to the parties, a change in the child's placement during a hearing on a petition for extension of the dispositional order.

If the court orders a child removed from the home, and if the parents are present at a hearing under [Wis. Stat.](#) § 48.357 or [Wis. Stat.](#) § 938.357, they must give the names and other identifying information of three relatives or other people over the age of 18 whose homes the parents request the court consider as placements, unless that information has previously been provided. If the parents do not provide that information at or before the hearing, the county department (or the DCF in a [Wis. Stat.](#) ch. 48 proceeding in Milwaukee County) or the agency responsible for implementing the order must allow the parents to provide that information later. [Wis. Stat.](#) §§ 48.357(2m)(bm), 938.357(2m)(bm).

## D. Change-in-Placement Order [§ 12.19]

If the child's placement is changed from an in-home placement to an out-of-home placement, the change-in-placement order must contain a finding that continued placement of the child in the child's home would be contrary to the welfare of the child and, unless one of the circumstances of [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. applies, *see supra* § 12.9, a finding that county department (or the DCF in a [Wis. Stat.](#) ch. 48 proceeding in Milwaukee County) or the agency primarily responsible for implementing the dispositional order has made reasonable efforts to prevent removal of the child from the home, while assuring that the child's health and safety are the paramount concerns. [Wis. Stat.](#) §§ 48.357(2v)(a)1., 938.357(2v)(a)1.; *see also* [Wis. Stat.](#) §§ 48.357(1)(c)3., (2m)(c), 938.357(1)(c)3., (2m)(c). The court's order must also include findings relating to any of the child's siblings placed outside the home, as noted in section 12.9, *supra*. [Wis. Stat.](#) §§ 48.357(2v)(a)2m., 938.357(2v)(a)2m.

In addition, if the placement is changed to outside the child's home and is recommended by the person or agency primarily responsible for implementing the dispositional order, the change-in-placement order must include a statement that the court approves the recommended placement. [Wis. Stat.](#) §§ 48.357(2v)(a)2., 938.357(2v)(a)2.; *see also* [Wis. Stat.](#) §§ 48.357(1)(am)3., (c)3., (2m)(c), 938.357(1)(am)3., (c)3., (2m)(c). If the out-of-home placement is not recommended by the person or agency primarily responsible for implementing the dispositional order, the change-in-placement order must include a statement that the court has given bona fide consideration to all parties' recommendations. [Wis. Stat.](#) §§ 48.357(2v)(a)2., 938.357(2v)(a)2.; *see also* [Wis. Stat.](#) §§ 48.357(1)(am)3., (c)3., (2m)(c), 938.357(1)(am)3., (c)3., (2m)(c). These statements must be included in the change-in-placement order regardless of whether the child's placement was changed from an in-home placement or from another out-of-home placement. [Wis. Stat.](#) §§ 48.357(2v)(a)2., 938.357(2v)(a)2.; *see also* [Wis. Stat.](#) §§ 48.357(1)(am)3., (c)3., (2m)(c), 938.357(1)(am)3., (c)3., (2m)(c).

If the court changes the placement of a child who is under the supervision of the county department (or under the supervision of the DCF in a [Wis. Stat.](#) ch. 48 proceeding in Milwaukee County) to a placement outside the child's home, the change-in-placement order must include an order ordering the child into, or to be continued in, the placement and care responsibility of the county department (or of the DCF, if in Milwaukee County in a [Wis. Stat.](#) ch. 48 case) as required under 42 [U.S.C.](#) § 672(a)(2) and assigning the county department (or the DCF, if appropriate) primary responsibility, or continued primary responsibility, for providing services to the child. [Wis. Stat.](#) §§ 48.357(2v)(a)1m., 938.357(2v)(a)1m. If the court removes a child from the custody of his or her parent, the court must order the responsible department or agency to provide notice of that removal—in addition to other specified information—to adult relatives whose homes the child's parent has identified as possible placements for the child. [Wis. Stat.](#) §§ 48.357(2v)(d), 938.357(2v)(d); *see supra* § 12.18.

If the court moves an Indian child from one out-of-home placement to another, the change-in-placement order must comply with the order of placement preference under [Wis. Stat.](#) § 48.028(7)(b) or, if applicable, [Wis. Stat.](#) § 48.028(7)(c). [Wis. Stat.](#) § 48.357(1)(am)3., (2m)(c)2. Similarly, if the court has removed an Indian juvenile from the home under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), and moves the juvenile to another out-of-home placement, the change-in-placement order must comply with the order of placement preference under [Wis.](#)



[Stat.](#) § 938.028(6)(a) or, if applicable, [Wis. Stat.](#) § 938.028(6)(b). [Wis. Stat.](#) § 938.357(1)(am)3., (2m)(c)2. If the court changes the placement of an Indian child from the home of a parent or Indian custodian to a placement outside that home, the order must also contain findings under [Wis. Stat.](#) § 48.357(2v)(a)4. and comply with the order of placement preference under [Wis. Stat.](#) § 48.028(7)(b) or, if applicable, [Wis. Stat.](#) § 48.028(7)(c). [Wis. Stat.](#) § 48.357(1)(c)3., (2m)(c)1. Likewise, if the court changes an Indian juvenile's placement from the home of a parent or Indian custodian to a placement outside that home, the order must contain findings under [Wis. Stat.](#) § 938.357(2v)(a)4. and comply with the order of placement preference under [Wis. Stat.](#) § 938.028(6)(a) or, if applicable, [Wis. Stat.](#) § 938.028(6)(b). [Wis. Stat.](#) § 938.357(1)(c)3., (2m)(c)1. The only exception for departing from the prescribed order of placement preference is a finding of good cause as described in [Wis. Stat.](#) § 48.028(7)(e) or [Wis. Stat.](#) § 938.028(7)(d). Under [Wis. Stat.](#) §§ 48.357(2v)(a)4. and 938.357(2v)(a)4., the order to remove an Indian child from the home of a parent or Indian custodian must contain specific information supporting a finding that to do otherwise would likely result in serious emotional or physical damage to the child, that active efforts have been made to prevent the breakup of the family, and that those efforts have been unsuccessful. *See also* [Wis. Stat.](#) §§ 48.028(4)(d), 938.028(4)(d).

If the court changes a child's placement to a residential care center for children and youth, a group home, or a shelter care facility certified as a qualified residential treatment program under [Wis. Stat.](#) § 48.675, the change-in-placement order must contain a finding as to each of the following:

1. Whether the needs of the child can be met through placement in a foster home;
2. Whether placement of the child in a residential care center for children and youth, a group home, or a shelter care facility certified under [Wis. Stat.](#) § 48.675 provides the most effective and appropriate level of care for the child in the least restrictive environment;
3. Whether the placement is consistent with the child's short-term and long-term goals, as specified in the permanency plan; and
4. Whether the court approves or disapproves the placement.

[Wis. Stat.](#) §§ 48.357(2v)(a)5., 938.357(2v)(a)5. In making these findings, the court must consider the standardized assessment and the recommendation of the qualified individual who conducted that assessment. [Wis. Stat.](#) §§ 48.357(2v)(a)5., 938.357(2v)(a)5. The answers to these questions do not affect whether the placement can be made. [Wis. Stat.](#) §§ 48.357(2v)(a)5., 938.357(2v)(a)5. If the results of the standardized assessment and recommendation of the qualified individual who conducted the standardized assessment are not available at the time of the order, the court "shall" defer making the required findings until up to 60 days after the date of the change in placement. [Wis. Stat.](#) §§ 48.357(2v)(a)6., 938.357(2v)(a)6.

If the proposed change in placement of an Indian child would remove the child from the home of a parent or Indian custodian, the court must give notice to the parent, Indian custodian, and tribe at least 10 days before the proposed change. If the identity or location of the parent or Indian custodian cannot be determined, the change in placement cannot take place until at least 15 days after notice has been received by the U.S. Secretary of the Interior. Upon request of the parent, Indian custodian, or tribe, the court must also grant a continuance of up to 20 additional days to prepare for the hearing. [Wis. Stat.](#) §§ 48.357(1)(c)2r., (2m)(br), 938.357(1)(c)2r., (2m)(br); *see also* [Wis. Stat.](#) §§ 48.028(4)(a), 938.028(4)(a).

Finally, if the court finds that any of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. apply, the change-in-placement order must contain a determination that the agency primarily responsible for providing services under the change in placement is not required to make reasonable efforts to return the child to the child's home. [Wis. Stat.](#) §§ 48.357(2v)(a)3., 938.357(2v)(a)3.; *see also* [Wis. Stat.](#) §§ 48.357(1)(c)3., (2m)(c), 938.357(1)(c)3., (2m)(c).

**Note.** In cases in which the child's placement is changed to outside the home, the court *must* make findings that continued placement of the child in his or her home would be contrary to the child's welfare and that the agency responsible for implementing the order has made reasonable efforts to prevent removal of the child from the child's home (unless one of the circumstances of [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. applies). Those findings need to be made on a case-by-case basis, based on circumstances specific to the child. All change-in-placement orders must specifically document or refer to the information on which the court's findings are based. A mere reference to the statutes is not enough. [Wis. Stat.](#) §§ 48.357(2v)(b), 938.357(2v)(b).

## E. Hearing to Determine Permanency Plan [§ 12.20]

If the court finds that the agency is not required to show that reasonable efforts were made to prevent removal of the child from the home because one of the specified circumstances applies—that is, if one of the circumstances specified in [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. applies, *see supra* § 12.9—then the court must hold a hearing to determine the permanency plan for the child.

[Wis. Stat.](#) §§ 48.38(4m), 938.38(4m). The hearing must be held within 30 days after the date of the court's finding. [Wis. Stat.](#) §§ 48.38(4m)(a), 938.38(4m)(a). At least 10 days before the hearing, the child, the parent, guardian, or legal custodian, the foster parent or other physical custodian, and, if the child is an Indian child, the child's Indian custodian and tribe, must receive notice of the time, place, and purpose of the hearing, the issues to be determined, and their right to be heard at the hearing. See [Wis. Stat.](#) §§ 48.38(4m)(b), 938.38(4m)(b). Foster parents and other physical custodians have a right to make an oral or written statement during the hearing or may submit written comments to the court before the hearing. [Wis. Stat.](#) §§ 48.38(4m)(d), 938.38(4m)(d).

## F. [Expiration of Change-in-Placement Order](#)

### [§ 12.21]

A change in placement cannot extend the expiration date of the original dispositional order except in cases in which the child's placement is changed from in the home to outside the home. In those cases, the court may extend the expiration date of the original dispositional order to the latest of the following dates, unless the court specifies a shorter period: (1) the date that is one year after the date on which the change-in-placement order is granted; (2) the date on which the child attains 18 years of age; (3) the child's 19th birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time in a secondary school or its vocational or technical equivalent and is reasonably expected to complete the schooling before the child attains 19 years of age; or (4) the child's 21st birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time in secondary school or its vocational or technical equivalent and if an individualized education program is in effect for the child. [Wis. Stat.](#) §§ 48.357(6), 938.357(6). This section does not apply, however, to juveniles whose placement is changed from in the home to a juvenile correctional facility or secured residential care center for children and youth. See [Wis. Stat.](#) § 938.357(6) (providing that extensions are permitted when change is from in-home placement to placement in a foster home, group home, residential care center for children and youth, home of relative who is not a parent, or supervised independent living arrangement).

If the child's placement is changed to the home from outside the home and the expiration date of the original dispositional order is more than one year past the date of the change-in-placement order, then the court must shorten the expiration date of the original dispositional order to one year after the date on which the change-in-placement order is granted. [Wis. Stat.](#) §§ 48.357(6)(b), 938.357(6)(b). The court may also specify a date that is shorter than one year after the date the change-in-placement order is granted.

## V. Extension of Dispositional Order [§ 12.22]

### A. In General [§ 12.23]

The court can extend a dispositional order only in accordance with the provisions of [Wis. Stat.](#) § 48.365 or [Wis. Stat.](#) § 938.365, which govern extensions in CHIPS, UCHIPS, JIPS, and delinquency cases. The court cannot extend a dispositional order placing a child in juvenile detention, nonsecure custody, or inpatient treatment. See [chapter 11, supra](#), for a discussion of [Wis. Stat.](#) § 938.34(3)(f) and (6) (am), which allow placement of juveniles in juvenile detention, nonsecure custody, or inpatient treatment.

A request for an extension can come from (1) the parent, (2) the child, (3) the guardian, (4) the legal custodian, (5) the prosecutor in the county in which the dispositional order was entered, (6) any person or agency bound by the dispositional order, (7) the court on its own motion, [Wis. Stat.](#) §§ 48.365(1m), 938.365(1m), (8) the expectant mother, [Wis. Stat.](#) § 48.365(1m), (9) the unborn child's guardian ad litem, *id.*, or (10) the Indian custodian, in a case involving an Indian child under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7). The request must be submitted to the court that entered the order. [Wis. Stat.](#) §§ 48.365(1m), 938.365(1m).

**Note.** In an unpublished decision, the court of appeals held that no petition or specific form of request is necessary to initiate proceedings to extend a CHIPS order. It is only necessary under [Wis. Stat.](#) § 48.365(1m) that a party notify the court that it is requesting an extension and that the notification comes before the expiration of the order. Further, the court stated that the lack of a petition setting forth the reasons for the extension does not deprive the court of jurisdiction. The court held that a written statement of reasons for an extension is not a requirement of [Wis. Stat.](#) § 48.365, because the parties learn the reasons for the extension at the hearing, and the supervising agency must file a written report. *Lafayette Cty. Dep't of Human Servs. v. Renee J.M. (In the Int. of Ashley D.)*, No. 00-3560, 2001 WL 521992 (Wis. Ct. App. May 17, 2001) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

The court cannot grant an extension of an original dispositional order for a delinquent juvenile subject to an order under [Wis. Stat.](#) § 938.34(4d), (4h), (4m), or (4n) if the juvenile is 17 years of age or older at the time the original dispositional order expires. [Wis. Stat.](#) § 938.355(4)(b); see also [State v. Terry T. \(In the Int. of Terry T.\)](#), 2003 WI App 21, 259 Wis. 2d 339, 657 N.W.2d 97.

The court cannot extend an order without a hearing. [Wis. Stat. §§ 48.365\(2\), 938.365\(2\)](#). The court must provide notice of the time and place of the extension hearing to all of the following: the child; the child's parents, guardian, legal custodian, or Indian custodian; the child's court-appointed special advocate; the prosecutor; the child's foster parent or other physical custodian; all other parties present at the original dispositional hearing; and, if the child is an expectant mother of a UCHIPS child, the unborn child's guardian ad litem. [Wis. Stat. §§ 48.365\(2\), 938.365\(2\)](#). If the child is an Indian child placed outside the home of the parent or Indian custodian, the child's tribe must also be notified. [Wis. Stat. § 48.365\(2\)](#). This also applies to Indian juveniles placed outside the home under [Wis. Stat. § 938.13\(4\), \(6\), \(6m\), or \(7\)](#). [Wis. Stat. § 938.365\(2\)](#). If the extension involves an adult expectant mother of an unborn child under [Wis. Stat. § 48.133](#), the court must notify the adult expectant mother, the unborn child's guardian ad litem, all parties present at the original dispositional hearing, and the prosecutor. [Wis. Stat. § 48.365\(2\)](#).

Neither [Wis. Stat. § 48.365](#) nor [Wis. Stat. § 938.365](#) applies to changes in placement and revocation of community supervision or aftercare; [Wis. Stat. §§ 48.357 and 938.357](#) exclusively govern these actions. [Wis. Stat. §§ 48.365\(7\), 938.365\(7\)](#); *see supra* §§ [12.4–21](#). The juvenile court lacks authority to order a change in placement as part of an extension proceeding unless the court has followed the procedures of [Wis. Stat. § 48.357](#) or [Wis. Stat. § 938.357](#). [Wis. Stat. §§ 48.365\(7\), 938.365\(7\)](#). [Wis. Stat. §§ 48.365 and 938.365](#) are also inapplicable to trial reunifications. [Wis. Stat. §§ 48.358 and 938.358](#) govern those proceedings.

## B. Time Periods [§ 12.24]

A request to extend a dispositional order must be made before the expiration of the order. [Wis. Stat. §§ 48.365\(6\), 938.365\(6\)](#). However, if the court receives a timely request but cannot hold a hearing on the request before the order expires, the court can temporarily extend the order for a period of not more than 30 days, not including any period of delay resulting from any of the circumstances specified in [Wis. Stat. § 48.315\(1\)](#) or [Wis. Stat. § 938.315\(1\)](#). A reasonable delay of not more than 20 days may be allowed in a proceeding involving the out-of-home placement of an Indian child under [Wis. Stat. ch. 48](#) or an Indian juvenile subject to [Wis. Stat. § 938.13\(4\), \(6\), \(6m\), or \(7\)](#) whom the court knows or has reason to know is an Indian child or Indian juvenile. The request may be made by the parent, Indian custodian, or tribe of the child or juvenile. *See* [Wis. Stat. §§ 48.315\(1\)\(j\), 938.315\(1\)\(a\)11](#). The court can order only *one* temporary extension. [Green Cnty. Dep't of Hum. Servs. v. H.N. \(In the Int. of B.J.N.\)](#), 162 Wis. 2d 635, 653–54, 469 N.W.2d 845 (1991).

**Note.** The Wisconsin Supreme Court held that the temporary 30-day extension allowed under [Wis. Stat. § 48.365\(6\)](#) (and, presumably, [Wis. Stat. § 938.365\(6\)](#)) does not deprive juveniles of liberty without due process because a violation of a liberty interest does not occur until the 30-day period has elapsed. [S.D.R. v. State \(In the Int. of S.D.R.\)](#), 109 Wis. 2d 567, 572, 326 N.W.2d 762 (1982).

**Note.** In an unpublished case, the court of appeals approved an extension beyond the 30-day temporary extension of [Wis. Stat. § 48.365\(6\)](#) based on the stipulation of all the parties. [Marathon Cnty. Dep't of Soc. Servs. v. Kyra D.M. \(In the Int. of Eli J.O.\)](#), No. 2005AP1231-FT, 2005 WL 2205900 (Wis. Ct. App. Sept. 13, 2005) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)). In another unpublished decision, the court of appeals held that the request for a temporary 30-day extension of a dispositional order must be explicit, not implied from a party's request for a continuance of the hearing on the petition to extend. [B.N. v. State \(In the Int. of L.B.\)](#), No. 89-0523, 1989 WL 129451 (Wis. Ct. App. Aug. 17, 1989) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

The Wisconsin Supreme Court has held that the 30-day temporary extension order is not part of the original dispositional order for purposes of [Wis. Stat. § 48.355\(4\)](#). [State v. W.P. \(In the Int. of W.P.\)](#), 153 Wis. 2d 50, 449 N.W.2d 615 (1990). This holding would also apply to [Wis. Stat. § 938.355\(4\)\(a\)](#). Therefore, if the filing of the petition for extension occurs before the child becomes an adult, but the child will become an adult during the 30-day temporary extension, the court can still order an extension. [W.P.](#), 153 Wis. 2d at 55.

The court cannot, under any circumstances, temporarily extend the dispositional order more than 30 days. [S.D.R.](#), 109 Wis. 2d at 577. Of course, [Wis. Stat. §§ 48.365\(6\) and 938.365\(6\)](#) both specify that the extension does not include any period of delay resulting from any of the circumstances specified in [Wis. Stat. § 48.315\(1\)](#) or [Wis. Stat. § 938.315\(1\)](#). The court must hear *and* decide the extension request before the extension period expires. *Id.*

**Comment.** The legislative history reveals that under the prior statute governing temporary extensions, [Wis. Stat. § 48.365\(3\)](#) (1977–78), the court could temporarily extend an order for not more than 30 days upon a showing of good cause. The legislature removed that provision in 1979 when it created [Wis. Stat. § 48.365\(6\)](#), which specifically permits a temporary extension only if the court receives the request for extension before the expiration of the order but cannot conduct a timely hearing. The statute thus specifies but one circumstance justifying good cause for temporary extension. [H.N.](#), 162 Wis. 2d at 646–47.

Under both [Wis. Stat. chs. 48 and 938](#), “[f]ailure ... to act within any time period ... does not deprive the court of personal or subject matter jurisdiction or of competency to exercise that jurisdiction.” [Wis. Stat. §§ 48.315\(3\), 938.315\(3\)](#). Furthermore, failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#)

§§ 48.315(3), 938.315(3). If the court or a party fails to act within an applicable statutory time period, the court may order any of the following: dismissal without prejudice, release of the child from secure or nonsecure custody or from the terms of a custody order, and any other relief that the court considers appropriate. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In addition, in [Wis. Stat.](#) ch. 938 cases, courts may dismiss a petition *with* prejudice. [Wis. Stat.](#) § 938.315(3). This remedy is not available under [Wis. Stat.](#) ch. 48. *See* [Wis. Stat.](#) § 48.315(3); *see also* 2007 Wis. Act 199. Regarding extensions under both the Children’s Code and the Juvenile Justice Code, [Wis. Stat.](#) §§ 48.315(3) and 938.315(3) apply to [Wis. Stat.](#) §§ 48.365(6) and 938.365(6). That is, if the court does not hold an extension hearing within the 30-day temporary extension, not including any period of delay resulting from any of the circumstances of [Wis. Stat.](#) §§ 48.315(1) and 938.315(1), the court must grant relief as provided in [Wis. Stat.](#) §§ 48.315(3) and 938.315(3). [Wis. Stat.](#) §§ 48.365(6), 938.365(6). Failure to object if a hearing is not held within the time period waives any challenge to the court’s competency to act on the extension request. [Wis. Stat.](#) §§ 48.365(6), 938.365(6).

Certain timelines still constitute a bright-line rule, but most do not. Failure to object in timely fashion to certain issues will waive any challenge to those issues. *See, e.g., Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190. In *Mikrut*, the supreme court held that challenges to competency are waived if not raised in the circuit court, but also concluded that an appellate court could disregard the waiver and address the issue in appropriate cases. *Id.* ¶ 3. The defendant in *Mikrut* had failed to challenge the circuit court’s competency until his case was on appeal. The supreme court upheld the decision of the court of appeals (which affirmed the circuit court) and concluded that the defendant waived his challenge by failing to raise it in the circuit court. *Id.* ¶ 31. In *Brunton v. Nuvel Credit Corp.*, 2010 WI 50, 325 Wis. 2d 135, 785 N.W.2d 305, *rev’g* 2009 WI App 3, 316 Wis. 2d 313, 762 N.W.2d 685, the supreme court analyzed waiver under [Wis. Stat.](#) § 421.401, the venue provision in the Wisconsin Consumer Act. The plaintiff in *Brunton*, a Rock County resident, sued a creditor in Dane County in connection with a consumer-credit transaction that took place in Rock County. The two parties engaged in litigation for more than a year before the creditor successfully sought summary judgment on the ground that Dane County was the improper venue. The plaintiff, on appeal, argued that the creditor had waived the challenge to jurisdiction by litigating for more than one year on the matter. The creditor responded that [Wis. Stat.](#) § 421.401 required an affirmative action to waive venue and argued that its appearance in court was insufficient to waive the challenge. The court of appeals concluded that the creditor’s active defense and participation for more than one year—including filing a notice of appearance, participation in a scheduling conference, and extensive exchange of discovery—waived a proper challenge to the competency of the court, and the court of appeals remanded the case for further proceedings. *Brunton*, 2009 WI App 3, ¶¶ 17–18, 316 Wis. 2d 313. The plaintiff sought further review in the supreme court, which reversed the court of appeals. The supreme court held that a defendant may waive the challenge to improper venue under [Wis. Stat.](#) § 421.401 by an “express statement” (either written or oral) to the court or “by conduct” (i.e., unambiguous affirmative acts). *Brunton*, 2010 WI 50, ¶ 39, 325 Wis. 2d 135. The supreme court held that the creditor’s actions demonstrated neither form of waiver, and it reversed the court of appeals and remanded the action to the circuit court for dismissal. *Id.* ¶ 53.

**Note.** In an unpublished decision, the court of appeals examined the relationship between formerly mandatory time limits and [Wis. Stat.](#) § 48.29, the substitution statute. *J.B. v. Waushara Cnty. (In the Int. of G.E.C.)*, No. 90-1426-FT, 1991 WL 29077 (Wis. Ct. App. Jan. 31, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). At the time of the original CHIPS adjudication, the parent filed a timely substitution request, which the court granted. One year later, the county sought an extension of the original dispositional order but requested a 30-day temporary extension under [Wis. Stat.](#) § 48.365(6). The same judge against whom the parent had filed the original substitution granted the extension (over the parent’s objection), then recused himself. The newly assigned judge ordered extension of the CHIPS dispositional order. The court of appeals reversed, holding that the original judge lost the authority to act in any capacity when he granted the parent’s substitution request and therefore could not properly issue the temporary extension order. Because of the invalidity of the temporary extension order, the circuit court lacked competency to extend the dispositional order.

## C. Court Report Required [§ 12.25]

### 1. In General [§ 12.26]

At the hearing on a request to extend a dispositional order, the person or agency primarily responsible for providing services to the child or expectant mother must file a written report describing the extent to which the dispositional order has been meeting the objectives of the plan for the child’s rehabilitation or care and treatment (in CHIPS, JIPS, and delinquency cases) or for the expectant mother’s rehabilitation and treatment and the unborn child’s care (in UCHIPS cases). [Wis. Stat.](#) §§ 48.365(2g)(a), 938.365(2g)(a). If the Office of Juvenile Offender Review (OJOR), a division of juvenile corrections in the Department of Corrections, *see infra* § 12.34, has examined a delinquent juvenile placed with the department, program personnel can also file a written report. [Wis. Stat.](#) § 938.365(2g)(a); *see also supra* § 12.12 (departmental review).

If the objectives concerning the treatment, care, or rehabilitation of the child, expectant mother, or unborn child, as specified in the original dispositional order, have not been met, the court can extend the order. If the court at the original dispositional hearing made a finding of dangerousness and then committed the juvenile to a juvenile correctional facility, the court need not find continued



dangerousness to extend the order. *R.E.H. v. State (In the Int. of R.E.H.)*, 101 Wis. 2d 647, 652, 305 N.W.2d 162 (Ct. App. 1981). Presumably, a finding of continued dangerousness is not required to extend a juvenile's order to a secured residential care center for children and youth.

**Comment.** In considering whether to extend the order, the court might consider objectives related to treatment of other family members. In *R.H. v. Dane County Department of Social Services (In the Interest of R.H.)*, 157 Wis. 2d 161, 458 N.W.2d 576 (Ct. App. 1990), the court of appeals held that when an original dispositional order required an incarcerated father to successfully address his chemical dependency before his son could return to his custody, and the evidence supported a finding that the father had not done so, this circumstance provided a valid basis to extend the dispositional order. Although failure to complete drug treatment serves as a valid basis for denying return of a child to his or her parent, the court cannot hold a parent in remedial contempt for failure to complete inpatient alcohol treatment. Rather, the due-process protections outlined in [Wis. Stat.](#) ch. 51 govern involuntary inpatient treatment. *C.S. v. Racine Cnty. (In re Finding of Contempt in the Int. of J.S.)*, 137 Wis. 2d 217, 404 N.W.2d 79 (Ct. App. 1987); see also *infra* [ch. 16](#) (contempt and juvenile sanctions). As the holding in the *R.H.* case emphasizes, the remedy for a parent not complying with the conditions of a CHIPS dispositional order might consist of not regaining custody of the child.

## 2. Children Placed Outside Home [§ 12.27]

For a child placed outside the home, the court report filed at the extension hearing must contain all the following information:

1. A copy of the permanency review panel's report, if any, see [Wis. Stat.](#) §§ 48.38(5), 938.38(5), and a response by the agency primarily responsible for providing services to the child, [Wis. Stat.](#) §§ 48.365(2g)(b)1., 938.365(2g)(b)1.;
2. An evaluation of the child's adjustment to the placement and any progress the child has made, [Wis. Stat.](#) §§ 48.365(2g)(b)2., 938.365(2g)(b)2.;
3. Suggestions for amendment of the permanency plan, [Wis. Stat.](#) §§ 48.365(2g)(b)2., 938.365(2g)(b)2.; see also *supra* [ch. 11](#); and
4. Specific information showing the efforts made to achieve the permanency goal of the permanency plan, including efforts by the parents to remedy conditions that contributed to the child's placement outside the home, [Wis. Stat.](#) §§ 48.365(2g)(b)2., 938.365(2g)(b)2.

For children already placed outside the home in a foster home, group home, nonsecured residential care center for children and youth, or shelter care facility for 15 of the most recent 22 months—not including any time the child was a runaway from the out-of-home placement or was residing in a trial reunification home—the report must contain a statement of whether a recommendation has been made to terminate the parental rights of the child's parents. [Wis. Stat.](#) §§ 48.365(2g)(b)3., 938.365(2g)(b)3. If such a recommendation has been made, the statement must indicate the date of the recommendation; any action taken to terminate parental rights; any barriers to termination; any steps taken to overcome the barriers; and the anticipated time of completing the steps to overcome the barriers. [Wis. Stat.](#) §§ 48.365(2g)(b)3., 938.365(2g)(b)3. In addition, if a recommendation to terminate has been made, the statement must include reasons why adoption would serve the best interests of the child and whether the child should be registered with the adoption information exchange. [Wis. Stat.](#) §§ 48.365(2g)(b)3., 938.365(2g)(b)3.

If a recommendation to terminate parental rights has not been made, the statement must explain the lack of a recommendation, given the length of the child's placement outside the home. [Wis. Stat.](#) §§ 48.365(2g)(b)3., 938.365(2g)(b)3. If the lack of adoptive resources provides the primary reason for not recommending termination, the agency must recommend the child's registration with the adoption information exchange or must explain why adoption would not serve the child's best interests. [Wis. Stat.](#) §§ 48.365(2g)(b)3., 938.365(2g)(b)3.

Finally, if an Indian child or an Indian juvenile under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) is placed outside the home of the parent or Indian custodian, the report filed at the extension hearing must also include specific information showing that active efforts under [Wis. Stat.](#) § 48.028(4)(d)2. or [Wis. Stat.](#) § 938.028(4)(d)2. have been made to prevent the breakup of the Indian child's or juvenile's family and that those efforts have proved unsuccessful. [Wis. Stat.](#) §§ 48.365(2g)(b)4., 938.365(2g)(b)4.

## 3. Children Not Placed Outside Home [§ 12.28]

For a child not placed outside the home, the report must contain a description of the efforts made by all the parties to meet the objectives of treatment, care, or rehabilitation of the child; an explanation for any failure to meet the objectives; and a description of plans for meeting the objectives. [Wis. Stat.](#) §§ 48.365(2g)(c), 938.365(2g)(c).

## **D. Hearing on Request for Extension**

### **[§ 12.29]**

The court cannot extend a dispositional order without a hearing. [Wis. Stat.](#) §§ 48.365(2), 938.365(2). The child, counsel, or guardian ad litem can consent to waive the appearance of the child at the hearing. [Wis. Stat.](#) §§ 48.365(3), 938.365(3). At the hearing on a request for extension, any party can present evidence relevant to the issue of extension. [Wis. Stat.](#) §§ 48.365(2m)(a)1., 938.365(2m)(a)1. If the child is placed outside the child's home, the person or agency primarily responsible for providing services to the child must present evidence showing that the person or agency has made reasonable efforts to achieve the permanency goal of the child's permanency plan, including, if appropriate, through an out-of-state placement. [Wis. Stat.](#) §§ 48.365(2m)(a)1., 938.365(2m)(a)1. In addition, the court must permit the child's foster parent or other physical custodian to make a written or oral statement during the hearing (or to submit a written statement before the hearing) relevant to the extension. [Wis. Stat.](#) §§ 48.365(2m)(ag), 938.365(2m)(ag). If an Indian child or an Indian juvenile subject to [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) is placed outside the home of a parent or an Indian custodian, the person or agency primarily responsible for providing services must present as evidence specific information showing that active efforts under [Wis. Stat.](#) § 48.028(4)(d)2. or [Wis. Stat.](#) § 938.028(4)(d)2., have been made to prevent the breakup of the Indian child's or juvenile's family and that those efforts have proved unsuccessful. [Wis. Stat.](#) §§ 48.365(2m)(a)1., 938.365(2m)(a)1.

The judge must determine which dispositions to consider for extensions. [Wis. Stat.](#) §§ 48.365(4), 938.365(4). The judge must make findings of fact and conclusions of law based on the evidence presented and must include a finding as to whether the person or agency responsible for providing services to the child made reasonable efforts to achieve the permanency goal of the permanency plan, including, if appropriate, through an out-of-state placement. [Wis. Stat.](#) §§ 48.365(2m)(a)1., 938.365(2m)(a)1.

If the court finds that any of the circumstances of [Wis. Stat.](#) § 48.355(2d)(b)1.–5. or [Wis. Stat.](#) § 938.355(2d)(b)1.–4. apply, the court must determine that the person or agency responsible for providing services to the child is not required to make reasonable efforts to return the child safely to the home. [Wis. Stat.](#) §§ 48.365(2m)(a)2., 938.365(2m)(a)2. The court must make the findings related to the agency's reasonable efforts to achieve the permanency goal of the permanency plan, or determine that one of the specified circumstances applies, on a case-by-case basis, based on circumstances specific to the child, and the court must document that information in the extension order. [Wis. Stat.](#) §§ 48.365(2m)(a)3., 938.365(2m)(a)3. A mere reference to the statutes that require these findings is not enough. [Wis. Stat.](#) §§ 48.365(2m)(a)3., 938.365(2m)(a)3. In the case of the out-of-home placement of an Indian child, or of an Indian juvenile under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7), the court must make findings of fact that active efforts under [Wis. Stat.](#) § 48.028(4)(d)2. or [Wis. Stat.](#) § 938.028(4)(d)2. were made to prevent the breakup of the Indian child's or juvenile's family and that those efforts have proved unsuccessful. [Wis. Stat.](#) §§ 48.365(2m)(a)1m., 938.365(2m)(a)1m.

If the court finds that the agency is not required to make reasonable efforts under [Wis. Stat.](#) § 48.38(4m) or [Wis. Stat.](#) § 938.38(4m) to return the child to the home, the court must hold a hearing within 30 days after that finding to determine the permanency plan for the child. [Wis. Stat.](#) §§ 48.365(2m)(ad), 938.365(2m)(ad). The foster parent or physical custodian has a right to make a written or oral statement during the hearing or submit a written statement before the hearing. The notice and right to be heard, however, do not make the foster parent or physical custodian a party to the proceeding. [Wis. Stat.](#) §§ 48.365(2m)(ag), 938.365(2m)(ag).

Although [Wis. Stat.](#) §§ 48.365(2m)(b) and 938.365(2m)(b) specifically require the court to state reasons for extending a CHIPS, UCHIPS, or JIPS dispositional order that places a child or expectant mother outside the home, this requirement applies to all discretionary decisions, including delinquency extensions.

An extended dispositional order must comply with [Wis. Stat.](#) § 48.355 or [Wis. Stat.](#) § 938.355. See [Wis. Stat.](#) §§ 48.365(2m)(a)1m., 938.365(2m)(a)1m. If the extension continues the child in the child's home, relates to an unborn child of an adult expectant mother, or involves a juvenile placed in a Type 2 residential care center for children and youth, a juvenile correctional facility, a secured residential care center for children and youth, the serious juvenile offender program, or aftercare supervision (or community supervision), the order must run for a specified period not exceeding one year after the date on which the order is entered. [Wis. Stat.](#) §§ 48.365(5), 938.365(5); see also [Wis. Stat.](#) § 938.34(4d), (4h), (4m), (4n). If the extension continues the placement of a child in an out-of-home placement, the order must run for a specified period of time not to extend beyond the latest of the following dates: (1) the date on which the child attains 18 years of age; (2) the date that is one year after the date on which the order is granted; (3) the child's 19th birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time at a secondary school or its vocational or technical equivalent and the child is reasonably expected to complete the program before the child attains 19; or (4) the child's 21st birthday or the date on which the child is granted a high-school or high-school-equivalency diploma, whichever occurs first, if the child is enrolled full time in secondary school or its vocational or technical equivalent and if an individualized education program is in effect for the child. [Wis. Stat.](#) §§ 48.365(5), 938.365(5). (For JIPS or delinquent juveniles, the out-of-home placement includes only a foster home, a group home, a residential care center for children or youth, the home of a relative other than a parent, or a supervised independent living arrangement. [Wis. Stat.](#) § 938.365(5).) When an extended order is in effect during the litigation of a petition seeking to terminate

parental rights or during the appeal of an order granting or denying termination of parental rights (TPR), the extended order remains in effect until all proceedings relating to the petition or the appeal have concluded. [Wis. Stat.](#) §§ 48.368, 938.368.

Finally, if the child is placed outside the home and has one or more siblings who have also been placed outside the home, the person or agency primarily responsible for providing services must present specific evidence that the agency has made reasonable efforts to place the child and any such siblings together, unless the court has determined that a joint placement would be contrary to the safety or well-being of the child or any of those siblings. In that case, the agency must present specific evidence that it has made reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and the siblings, unless it would be contrary to the child's or any sibling's safety or well-being. [Wis. Stat.](#) §§ 48.365(2m)(a)1r.a., 938.365(2m)(a)1r.a. The court's findings of fact must include determinations that relate to this required evidence in the case of a child with siblings placed outside the home. [Wis. Stat.](#) §§ 48.365(2m)(a)1r.b., 938.365(2m)(a)1r.b.

## VI. [Permanency Hearing](#)

### [§ 12.30]

When a child is placed outside the home, the court must hold a hearing to review the permanency plan and to make certain determinations for each child from whom a permanency plan is required (under [Wis. Stat.](#) § 48.38(2) or 938.38(2)) no later than 12 months after the date the child was first removed from the home. [Wis. Stat.](#) §§ 48.38(5m)(a), 938.38(5m)(a). In addition, the court must hold such a hearing every 12 months after a previous permanency hearing for as long as the child is placed outside the home. [Wis. Stat.](#) §§ 48.38(5m)(a), 938.38(5m)(a). The 12-month period includes trial reunifications under [Wis. Stat.](#) § 48.358 and [Wis. Stat.](#) § 938.358.

**Note.** Under [Wis. Stat.](#) §§ 48.38(5)(c) and 938.38(5)(c), the following determinations must be made: (1) the continued need for and the safety and appropriateness of the placement (subject to the considerations for placement in a qualified residential treatment program, *see* [Wis. Stat.](#) §§ 48.38(5)(bm)4., (5m)(c)4., 938.38(5)(cm), (5m)(c)4.); (2) the extent of compliance with the permanency plan by all persons or agencies bound by the plan; (3) the efforts to involve other service providers to meet the child's and the parents' needs; (4) the progress made to eliminate the causes for the child's removal from the home and toward safely returning the child back home; (5) the date it is likely the child will be returned home or placed for adoption, with a guardian, with a fit and willing relative, or in some other planned permanent living arrangement that includes an appropriate, enduring relationship with an adult; (6) the continuing appropriateness of the permanency goal and any concurrent permanency goals for the child; (7) if the child has been placed outside the home—in a foster home, group home, residential care center for children and youth, or shelter care facility—for 15 of the last 22 months (not including any time the child was a runaway or residing in a trial reunification home), the appropriateness of the plan, and the circumstances that prevent the child from being returned home, having a TPR petition filed, being placed for adoption or with a guardian or relative, or being placed in some other planned permanent living arrangement that includes an appropriate, enduring relationship with an adult; (8) whether the agency has made reasonable efforts to achieve the permanency goal of the permanency plan, including, if appropriate, through an out-of-state placement; (9) the steps taken by the agency to ascertain whether the child has regular, ongoing opportunities to engage in age-appropriate or developmentally appropriate activities and to ensure that the child's caregiver is applying the reasonable and prudent parent standard to related decisions, if the permanency goal of the child's permanency plan is placement of the child in a planned permanent living arrangement that includes an appropriate, enduring relationship with an adult; (10) whether the agency has made reasonable efforts to place a child with any siblings who have been removed from the home, unless a joint placement would be contrary to the safety or well-being of the child or any siblings, in which case the court or permanency review panel must determine whether the agency made reasonable efforts to provide for frequent visitation or other ongoing interaction between the child and siblings, unless contrary to the child's or any sibling's safety or well-being; (11) in the case of an Indian child or an Indian juvenile under [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) placed outside the home of a parent or an Indian custodian, whether active efforts were made to prevent the breakup of the family, whether those efforts have proved unsuccessful, and whether the Indian child's or Indian juvenile's placement complies with the order of placement preference under [Wis. Stat.](#) § 48.028(7)(b) or (c) or [Wis. Stat.](#) § 938.028(6)(a) or (b) or whether there is good cause under [Wis. Stat.](#) § 48.028(7)(e) or [Wis. Stat.](#) § 938.028(6)(d) for departing from the order; and (12) the appropriateness of the transition-to-independent-living plan developed under [Wis. Stat.](#) § 48.385(1) or [Wis. Stat.](#) § 938.385(1), the extent of compliance with that plan, and the progress of the child toward making the transition to a successful adulthood.

At least 30 days before the hearing, the court or agency must give the following parties notice of the time, place, and purpose of the hearing, of the issues to be determined at the hearing, and of the parties' right to be heard: the child; the child's parent, guardian, and legal custodian; the child's foster parent, the operator of the facility in which the child lives, or the relative with whom the child lives; and, if the child is an Indian child or a juvenile subject to [Wis. Stat.](#) § 938.13(4), (6), (6m), or (7) and is placed outside the home of a parent or an Indian custodian, the Indian custodian and tribe. [Wis. Stat.](#) §§ 48.38(5m)(b), 938.38(5m)(b). The court or agency also must notify the child's counsel, the child's guardian ad litem, the child's court-appointed special advocate, the agency that prepared the permanency plan, the child's school, the representative of the public, and, if the child is an Indian child who is placed outside the home of his or her parent or Indian custodian, the Indian child's Indian custodian and tribe, of the time, place, and purpose of the hearing, the issues to be determined at



the hearing, and the fact that they may have an opportunity to be heard at the hearing. [Wis. Stat. §§ 48.38\(5m\)\(b\), 938.38\(5m\)\(b\)](#). The notice to the child's school must also include the name and contact information for the assigned caseworker or social worker. [Wis. Stat. §§ 48.38\(5m\)\(b\), 938.38\(5m\)\(b\)](#).

A child, parent, guardian, legal custodian, foster parent, operator of a facility, or relative who receives notice of the hearing has a right to be heard by submitting written comments not less than 10 working days before the hearing or by participating at the hearing. [Wis. Stat. §§ 48.38\(5m\)\(c\)1., 938.38\(5m\)\(c\)1.](#) (While a foster parent, an operator of the facility in which the child lives, and a relative with whom a child lives are entitled to notice and have a right to be heard at the hearing, they do not become parties to the proceeding on that basis.) The counsel, guardian ad litem, court-appointed special advocate, agency, school, or person representing the interests of the public who receives notice of the hearing may have an opportunity to be heard at the hearing by submitting written comments not less than 10 working days before the hearing or by participating at the hearing. [Wis. Stat. §§ 48.38\(5m\)\(c\)1., 938.38\(5m\)\(c\)1.](#) In certain circumstances, the court must consult with the child, in an age-appropriate and developmentally appropriate manner, regarding the child's permanency plan and any other matters the court finds appropriate; if the circumstances do not support such a consultation with the child, the court may permit the child's caseworker, counsel, or guardian ad litem to make a written or oral statement during the hearing, or to submit a written statement before the hearing, expressing the child's wishes, goals, and concerns regarding the permanency plan and other appropriate matters. [Wis. Stat. §§ 48.38\(5m\)\(c\)2., 938.38\(5m\)\(c\)2.](#) If the permanency goal of the child's permanency plan is placement in a planned permanent living arrangement that includes an appropriate, enduring relationship with an adult, then the agency that prepared the permanency plan must present specific information to the court showing that the agency made intensive and ongoing efforts to return the child home or to place the child for adoption, with a guardian, or with a fit and willing relative, but those efforts have proved unsuccessful. [Wis. Stat. §§ 48.38\(5m\)\(c\)3., 938.38\(5m\)\(c\)3.](#) At least five days before the hearing, the agency that prepared the permanency plan must file the plan with the court along with any comments it received. The plan must also be provided to the child's parent, guardian, and legal custodian, the prosecutor, the child's counsel or guardian ad litem, the court-appointed special advocate, and the Indian custodian or tribe of an Indian child or an Indian juvenile under [Wis. Stat. § 938.13\(4\), \(6\), \(6m\), or \(7\)](#) who has been placed outside the home. [Wis. Stat. §§ 48.38\(5m\)\(d\), 938.38\(5m\)\(d\)](#).

If the child is placed in a qualified residential treatment program, the agency that prepared the permanency plan must present to the court specific information showing all of the following, which the court must consider when determining the continuing necessity for and the safety and appropriateness of the placement:

- a. Whether ongoing assessment of the strengths and needs of the child continues to support the determination that the needs of the child cannot be met through placement in a foster home, whether the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment, and how the placement is consistent with the short-term and long-term goals for the child, as specified in the child's permanency plan.
- b. The specific treatment or service needs that will be met for the child in the placement and the length of the time the child is expected to need the treatment or services.
- c. The efforts made by the agency to prepare the child to return home or to be placed with a fit and willing relative, a guardian, or an adoptive parent or in a foster home.

[Wis. Stat. § 48.38\(5m\)\(c\)4.](#); *see also* [Wis. Stat. § 938.38\(5m\)\(c\)4.](#) (providing similar requirements for juvenile placed in qualified residential treatment program). The agency must provide this information to the court and the persons designated in [Wis. Stat. § 48.38\(5m\)\(d\) or Wis. Stat. § 938.38\(5m\)\(d\)](#) at least five days before the hearing.

**Note.** While agency records are generally confidential, *see infra* [ch. 15](#) (confidentiality); *see also* [Wis. Stat. §§ 48.78, 938.78](#), the child's counsel or guardian ad litem, the court-appointed special advocate, the prosecutor, and an Indian child's Indian custodian and tribe may have access to any agency records related to the child to participate in the permanency hearing. Any information obtained from those records cannot be further disclosed to anyone. [Wis. Stat. §§ 48.38\(5m\)\(d\), 938.38\(5m\)\(d\)](#).

The court must make written findings of facts and conclusions of law relating to the determinations in [Wis. Stat. §§ 48.38\(5\)\(c\) and 938.38\(5\)\(c\)](#), as described *supra*. [Wis. Stat. §§ 48.38\(5m\)\(e\), 938.38\(5m\)\(e\)](#). A copy of the findings of fact and conclusions of law must be provided to most of those who are entitled to receive notice of the hearing. *See* [Wis. Stat. §§ 48.38\(5m\)\(e\), 938.38\(5m\)\(e\)](#).

**Comment.** It is odd that the statutes do not specify that a copy of the findings of fact and conclusions of law be provided to the child's counsel or guardian ad litem.

The court's findings related to the efforts made by the agency to achieve the permanency goal of the permanency plan must be made on a case-by-case basis, based on circumstances specific to the child, and must be documented in the findings of fact and conclusions of law. A mere reference to the statute requiring such findings is not enough. [Wis. Stat. §§ 48.38\(5\)\(c\)7., \(5m\)\(e\), 938.38\(5\)\(c\)7., \(5m\)\(e\)](#).

If the findings of fact and conclusions of law conflict with the child's dispositional order or provide for any new services, the court must revise the order under [Wis. Stat. § 48.363](#) or [Wis. Stat. § 938.363](#), change the child's placement under [Wis. Stat. § 48.357](#) or [Wis. Stat. § 938.357](#), or order a trial reunification under [Wis. Stat. § 48.358](#) or [Wis. Stat. § 938.358](#). [Wis. Stat. §§ 48.38\(5m\)\(f\), 938.38\(5m\)\(f\)](#).

**Comment.** It appears from the language of the statutes that if the dispositional order must be revised or the child's placement must be changed as a result of the court's findings at the permanency hearing, a separate hearing need not occur. Rather, the revision or change in placement would occur at the permanency hearing.

## VII. Serious Juvenile Offender Program [§ 12.31]

### A. In General [§ 12.32]

As explained in [chapter 11](#), *supra*, the court can order a juvenile to participate in the serious juvenile offender program, [Wis. Stat. § 938.538](#), if the juvenile is adjudicated delinquent for committing a crime specified in [Wis. Stat. § 938.34\(4h\)](#). The offense committed by the juvenile determines the length of participation in the program. *See* [Wis. Stat. § 938.355\(4\)\(b\)](#).

### B. Program Components [§ 12.33]

The program consists of component phases that include providing the juvenile with one or more of the following sanctions: (1) placement in a Type 1 juvenile correctional facility or secured residential care center for children and youth; (2) placement in a foster home, group home, residential care center for children and youth, or secured residential care center for children and youth; (3) intensive field supervision; (4) electronic monitoring; (5) alcohol or other drug abuse (AODA) treatment; (6) mental health treatment; (7) community service; (8) restitution; (9) educational and employment services; and (10) any other program prescribed by the Department of Corrections. [Wis. Stat. § 938.538\(3\)\(a\)1.–9.](#)

**Note.** The Wisconsin Supreme Court severed as unconstitutional those provisions of the serious juvenile offender program, *see* [Wis. Stat. § 938.538\(3\)\(a\)1., 1m.](#), that subjected a juvenile to placement in an adult (Type 1) prison. *State v. Hezzie R. (In the Int. of Hezzie R.)*, 219 Wis. 2d 848, [580 N.W.2d 660](#), *as amended on reconsideration*, 220 Wis. 2d 360 (1998). The Wisconsin Legislature has since formally repealed the Type 1 prison-related provisions from [Wis. Stat. § 938.538\(3\)\(a\)1.](#) *See* 2005 Wis. Act 344, § 607.

Changes in placement and revisions of dispositional orders for juveniles placed in the program do *not* fall within the purview of [Wis. Stat. § 938.357](#) or [Wis. Stat. § 938.363](#). [Wis. Stat. § 938.538\(5\)\(c\)](#). Instead, the Department of Corrections can provide the above sanctions in any order, can provide more than one sanction at a time, and can return to a sanction previously used for the juvenile. [Wis. Stat. § 938.538\(3\)\(b\)](#). The department need not hold a hearing to impose a sanction on the juvenile unless the department, by administrative rule, provides for a hearing. *Id.*; *see also* [Wis. Admin. Code § DOC 396.10](#).

If a juvenile violates a condition of participation in the program while placed in a Type 2 juvenile correctional facility, the department can, without a hearing, return the juvenile to a Type 1 juvenile correctional facility or a secured residential care center for children and youth. [Wis. Stat. § 938.538\(4\)\(a\)](#). [Wis. Stat. § 938.02\(20\)](#) defines *Type 2 juvenile correctional facility*.

### C. Discharge from Program [§ 12.34]

If the juvenile has completed at least three years of the program, the Department of Corrections can discharge the juvenile from the program and from departmental supervision and control. [Wis. Stat. § 938.538\(5\)\(b\)](#). If the juvenile has completed at least two years of the program, the OJOR, a division of juvenile corrections in the Department of Corrections, *see supra* [§ 12.26](#), may release the juvenile to aftercare supervision (or community supervision). [Wis. Stat. § 938.538\(5\)\(a\)](#). The department has responsibility for providing aftercare supervision (or community supervision) to juveniles released from the program. [Wis. Stat. § 938.538\(5\)\(a\)](#).

## VIII. Duty to Warn in CHIPS, UCHIPS, JIPS, and Delinquency Cases [§ 12.35]

Just as the court must explain to a parent of a child or to an expectant mother of an unborn child found to be in need of protection or services the possible grounds for TPR and the conditions necessary for returning the child or expectant mother home, *see supra* [ch. 11](#), the court must give oral warnings at hearings in which revisions, extensions, or changes in placement result in placement of the child or expectant mother outside the home and at permanency review hearings under [Wis. Stat. § 48.38\(5m\)](#) or [Wis. Stat. § 938.38\(5m\)](#). [Wis. Stat. §§ 48.356\(1\), 938.356\(1\)](#). The warning requirement also applies whenever the court orders placement outside the home for a juvenile adjudicated delinquent under [Wis. Stat. § 938.34](#). *See* [Wis. Stat. § 938.356\(1\)](#). In addition, the resulting order must contain written

warnings. [Wis. Stat.](#) §§ 48.356(2), 938.356(2). Not every order placing a child outside the home must contain the written notice required in [Wis. Stat.](#) § 48.356(2). The statutory notice requirements are satisfied when at least one of the CHIPS orders contains the written notice. [Wis. Stat.](#) § 48.356(2) does not require that notice be given in every CHIPS order, and it does not require that notice be in the last CHIPS order. *St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D. (In re Termination of Parental Rts. to Michael D.)*, 2016 WI 35, 368 Wis. 2d 170, 880 N.W.2d 107 (modifying *Waukesha Cnty. v. Steven H. (In re Termination of Parental Rts. of Brittany Ann H.)*, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607).

The duty to warn is mandatory. *Cynthia E. v. La Crosse Cnty. Hum. Servs. Dep't (In the Int. of Jamie L.)*, 172 Wis. 2d 218, 493 N.W.2d 56 (1992); *M.P. v. Dane Cnty. Dep't of Hum. Servs. (In the Int. of D.P.)*, 170 Wis. 2d 313, 488 N.W.2d 133 (Ct. App. 1992); *Rock Cnty. Dep't of Soc. Servs. v. K.K. (In the Int. of K.K.)*, 162 Wis. 2d 431, 469 N.W.2d 881 (Ct. App. 1991); *D.F.R. v. Juneau Cnty. (In re D.F.)*, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988).

**Note.** In *Rock County Department of Social Services v. K.K.*, 162 Wis. 2d 431, the court of appeals held that the circuit court properly terminated a father's parental rights on *abandonment* grounds when the county had filed petitions that alleged CHIPS grounds and abandonment grounds separately and the court had issued at least one set of dispositional orders containing the [Wis. Stat.](#) § 48.356(2) warnings.

The court of appeals, in an unpublished opinion, ruled that the circuit court can delegate the requirement to provide notice of grounds to terminate and the written dispositional order. *Manitowoc Dep't of Hum. Servs. v. Jacob G. (In re Termination of Parental Rts. to Jamal G.)*, Nos. 2008AP2710, 2008AP2711, 2008AP2712, 2009 WL 2602353, ¶¶ 11, 16–18 & n.4 (Wis. Ct. App. Aug. 26, 2009) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (finding adequate notice when mailed by corporation counsel and actually received by parents and observing that court in *D.F.R. v. Juneau Cnty.*, 147 Wis. 2d 486, had discussed the mandatory nature of notice itself and not the method of service when circuit court failed to include written notice concerning TPR grounds in its orders).

The court of appeals in *Kimberly S.S. v. Sebastian X.L. (In re Termination of Parental Rights to Jillian K.L.)*, 2005 WI App 83, 281 Wis. 2d 261, 697 N.W.2d 476, ruled that the mother, who sought termination of her former husband's parental rights, need not prove that a *family court* order included the warnings provided in [Wis. Stat.](#) § 48.356. The court reasoned that the fact that former [Wis. Stat.](#) § 767.24 (2003–04) (the custody and physical placement section of the Family Code) required a family court to provide the applicable notice did not establish that provision of the notice was an element of proof under [Wis. Stat.](#) § 48.415(4). *Kimberly S.S.*, 2005 WI App 83, ¶ 9, 281 Wis. 2d 261. The court further determined that the father's attempt to define [Wis. Stat.](#) § 48.415(4) by importing intent from former [Wis. Stat.](#) § 767.24 failed because the meaning of [Wis. Stat.](#) § 48.415(4) was “apparent from the text of the statute itself.” *Kimberly S.S.*, 2005 WI App 83, ¶ 9, 281 Wis. 2d 261. (Note: [Wis. Stat.](#) § 767.24 has since been amended and renumbered as [Wis. Stat.](#) § 767.41.)

Failure to warn a parent as required by [Wis. Stat.](#) §§ 48.356 and 938.356 will preclude the prosecutor from meeting the burden of proof in a later TPR proceeding based on abandonment under [Wis. Stat.](#) § 48.415(1) or on continuing need of protection or services under [Wis. Stat.](#) § 48.415(2). See *infra* [ch. 17](#) (TPR).

## IX.

### Sexually Violent Person Commitments [§ 12.36]

[Wis. Stat.](#) ch. 980 allows civil commitments for persons deemed to be sexually violent persons, i.e., sexual predators. [Wis. Stat.](#) ch. 980 defines *sexually violent person*, in part, as someone who “is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.” [Wis. Stat.](#) § 980.01(7). [Wis. Stat.](#) ch. 980 further defines *likely* as “more likely than not.” [Wis. Stat.](#) § 980.01(1m). A juvenile delinquency adjudication for a sexual assault may be used as a predicate offense in a [Wis. Stat.](#) ch. 980 commitment proceeding. The court of appeals has also specifically rejected a claim that there is no reasonable basis to prove dangerousness in juveniles and that [Wis. Stat.](#) ch. 980, with its requirement of dangerousness, cannot be constitutionally applied to juveniles. *State v. Matthew A.B. (In re Commitment of Matthew A.B.)*, 231 Wis. 2d 688, 713–16, 605 N.W.2d 598 (Ct. App. 1999).

Although [Wis. Stat.](#) ch. 980 originally referred to adjudications under [Wis. Stat.](#) ch. 938, and not explicitly to the comparable delinquency provisions of the former [Wis. Stat.](#) ch. 48 (1993–94), the court of appeals has interpreted statutory history and language to conclude that [Wis. Stat.](#) ch. 980 petitions can be filed against persons adjudicated delinquent under the former [Wis. Stat.](#) ch. 48 (1993–94). *State v. Gibbs (In re Commitment of Gibbs)*, 2001 WI App 83, 242 Wis. 2d 640, 625 N.W.2d 666. In addition, the Wisconsin Legislature has since amended [Wis. Stat.](#) ch. 980 to include specific references to delinquency adjudications under the former [Wis. Stat.](#) § 48.34. See, e.g., [Wis. Stat.](#) § 980.01(1j) (defining *incarceration*); see also [Wis. Stat.](#) § 980.015(2)(b).

## X. Practice Form [§ 12.37]

The form in this section is offered as a practice guide. Always check original sources of authority for current law. When using the sample form, also check local practice and adapt the form language to fit the client's circumstances. Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System's website, at <https://www.wicourts.gov/forms1/circuit.htm>. A list of those standard forms is included in [appendix B](#), *infra*. Section [12.39](#), *infra*, provides a list of standard juvenile court forms that might be useful in cases involving the material in this chapter.

**A. Notice of Intent to Pursue Postdispositional Relief (Form CRM-0211) [§ 12.38]**

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of  
\_\_\_\_\_

Case No. \_\_\_\_\_



A Person Under the Age of 17<sup>[27]</sup>



---

**NOTICE OF INTENT TO PURSUE POSTDISPOSITIONAL RELIEF**

---

TO: Office of the District Attorney  
(address)

Clerk of Circuit Court  
(address)

---

PLEASE TAKE NOTICE that (juvenile's name) intends to seek postdispositional relief from the dispositional order dated (date), of the Circuit Court for (county) County, the Honorable (judge's name) presiding.

2. Counsel for (juvenile's name) was appointed by the State Public Defender. *(He)* *(She)* requests appointment of appellate counsel by the State Public Defender.

Name of Trial Counsel:

Address of Trial Counsel:

Email address of  
Trial Counsel:

Address of Juvenile:

Dated

(Juvenile's name)





## **XI. [Standard Juvenile Court Forms](#)**

## [§ 12.39]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose  |
|--------------------------|---------------------------|---|--|
| <a href="#">IW-1754</a>  | Both                      | Notice of change in placement (out-of-home to out-of-home/out-of-home to in-home/in-home to in-home)—Indian Child Welfare Act                                       | Provide notice to interested persons, in a case involving a child subject to ICWA, that a change in placement has taken place or will take place and that the persons receiving notice have a right to request a hearing |
| <a href="#">IW-1766</a>  | Both                      | Request to change placement, revise dispositional order, extend dispositional order, review permanency plan, terminate dispositional order—Indian Child Welfare Act | Request that the court change placement, revise the dispositional order, extend the dispositional order, review the permanency plan, or terminate the dispositional order of a child subject to ICWA                     |
| <a href="#">IW-1788</a>  | Both                      | Order for extension of dispositional order/consent decree (out-of-home placement only)—Indian Child Welfare Act   | Extend a dispositional order or consent decree for correctional and certain out-of-home placements of child subject to ICWA  |
| <a href="#">IW-1788T</a> | Both                      | Order for extension of dispositional order/consent decree with termination of parental rights notice (out-of-home placement only)—Indian Child Welfare Act          | Extend a dispositional order or consent decree for correctional and certain out-of-home placements of child subject to ICWA and give notice of grounds to terminate parental rights                                      |
| <a href="#">IW-1789T</a> | Both                      | Order for change in placement with termination of parental rights notice (in-home to out-of-home placement only)—Indian Child Welfare Act                           | Change placement from the child's home to an out-of-home placement in a case involving a child subject to ICWA and give notice of grounds to terminate parental rights   |
| <a href="#">IW-1790T</a> | Both                      | Order for change in placement with termination of parental rights notice (in-home to out-of-home placement only)—Indian Child Welfare Act                           | Change placement from the child's home to an out-of-home placement in a case involving a child subject to ICWA and give notice of grounds to terminate parental rights   |
| <a href="#">IW-1791</a>  | Both                      | Permanency hearing order—Indian Child Welfare Act   | Approve, disapprove, or revise the permanency plan in a case involving a child subject to ICWA   |

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose  |
|--------------------------|---------------------------|---|--|
| <a href="#">JD-1754</a>  | Both                      | Notice of change in placement (out-of-home to out-of-home/out-of-home to in-home/in-home to in-home)  | Provide notice to interested persons that a change in placement has taken place or will take place and that they have a right to request a hearing   |
| <a href="#">JD-1755</a>  | Ch. 938                   | Notice to school district to transfer records   | Provide notice to the school district that a juvenile has been transferred to a juvenile facility or a secured residential care center for children and youth so that the pupil records can be transferred |
| <a href="#">JD-1765</a>  | Both                      | Order granting temporary extension  | Temporarily extend an unexpired dispositional order until a hearing can be held on a petition to extend  |
| <a href="#">JD-1766</a>  | Both                      | Request to change placement, revise dispositional order, extend dispositional order, review/permanency plan, terminate consent decree/dispositional order | Request that the court change the juvenile's placement, revise the dispositional order, extend the dispositional order, review the permanency plan, or terminate the consent decree or dispositional order |
| <a href="#">JD-1786</a>  | Both                      | Order for revision of dispositional order   | Revise dispositional order   |
| <a href="#">JD-1786T</a> | Both                      | Order for revision of dispositional order with termination of parental rights notice  | Revise dispositional order and give notice of grounds to terminate parental rights   |
| <a href="#">JD-1787</a>  | Both                      | Order for extension of dispositional order/consent decree (in-home placement only)  | Extend a dispositional order or consent decree for in-home placement   |
| <a href="#">JD-1788</a>  | Both                      | Order for extension of dispositional order/consent decree (out-of-home placement only)  | Extend a dispositional order or consent decree for correctional and certain out-of-home placements   |
| <a href="#">JD-1788T</a> | Both                      | Order for extension of dispositional order/consent decree with termination of parental rights notice (out-of-home placement only)                         | Extend a dispositional order or consent decree for correctional and certain out-of-home placements and give notice of grounds to terminate parental rights   |
| <a href="#">JD-1789T</a> | Both                      | Order for change of placement with termination of parental rights notice (in-home to out-of-home placement only)  | Change placement from the juvenile's/child's home to an out-of-home placement and give notice of grounds to terminate parental rights  |
| <a href="#">JD-1790T</a> | Both                      | Order for change of placement with termination of parental rights notice (out-of-home to out-of-home placement only)                                      | Change placement from one out-of-home to another out-of-home placement and give notice of grounds to terminate parental rights   |

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|--------------------------|---------------------------|--|---|
| <a href="#">JD-1791</a>  | Both                      | Permanency hearing order   | Approve, disapprove, or revise the permanency plan  |
| <a href="#">JD-1791T</a> | Both                      | Permanency hearing order with termination of parental rights notice  | Approve, disapprove, or revise the permanency plan  |
| <a href="#">JD-1792</a>  | Both                      | Order for change in placement (out-of-home to in-home placement only)  | Change placement from out-of-home to in-home placement  |
| <a href="#">JD-1800</a>  | Both                      | Request to extend consent decree   | Give notice to all interested persons of request for extension of consent decree  |
| <a href="#">JD-1801</a>  | Both                      | Notice and request for trial reunification, extension of trial reunification, or revocation of trial reunification | Provide notice of request for a trial reunification, extension of a trial reunification, or revocation of a trial reunification |
| <a href="#">JD-1802</a>  | Both                      | Order for trial reunification  | Grant a request for a trial reunification   |
| <a href="#">JD-1803</a>  | Both                      | Order for extension of trial reunification   | Grant a request for an extension of a trial reunification   |
| <a href="#">JD-1804</a>  | Both                      | Order for revocation of trial reunification  | Grant a request for revocation of a trial reunification   |
| <a href="#">JD-1805</a>  | Both                      | Order granting temporary extension of trial reunification  | Grant a request for a temporary extension of a trial reunification  |
| <a href="#">JD-1806</a>  | Both                      | Request for transition to discharge hearing  | Request that the court hold a transition to discharge hearing before the termination date of an order for out-of-home care      |

## Supplement Chapter 13

### Appeals

Book section supplemented: [13.1](#)

**Note:** In the opinion of the authors, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2022–23 revision.

#### 13.1 Scope of Chapter

[Page 1: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through

May 30, 2024.

## Chapter 13

### Appeals

---

#### I. [Scope of Chapter](#)

##### [§ 13.1]

This chapter discusses the procedure for trial counsel to appeal nonfinal orders in cases under the Wisconsin Children’s Code ([Wis. Stat. ch. 48](#)) and the Wisconsin Juvenile Justice Code ([Wis. Stat. ch. 938](#)), as well as trial counsel’s responsibility for initiating appellate review of final orders under both codes. It refers to the various statutory provisions governing the types of appeals likely to occur in children’s and juvenile cases.<sup>1</sup>

This chapter does not cover in detail the rules of appellate procedure, nor does it examine the rules on collateral attacks on a judgment or motions for modification of a judgment after the time for direct appeal has elapsed. In a notable exception, however, section [13.13](#), *infra*, discusses the procedures specific to appeals of orders in termination of parental rights (TPR) cases in some detail.

**Note.** For a detailed discussion of appellate procedure, see Michael S. Heffernan, [Appellate Practice and Procedure in Wisconsin](#) (State Bar of Wis. 9th ed. 2022 & Supp.).

#### II. Final and Nonfinal Orders [§ 13.2]

Defense counsel must understand the difference between final orders and nonfinal orders in juvenile cases because different procedures apply depending on the finality of the order.

A final order “is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties.” [Wis. Stat. § 808.03\(1\)](#). In juvenile cases, examples of final orders include (1) dispositional orders in delinquency cases or in cases of children in need of protection or services (CHIPS), juveniles in need of protection or services (JIPS), or unborn children in need of protection or services (UCHIPS); (2) orders extending or revising dispositional orders; (3) orders changing placement; (4) orders terminating parental rights; (5) sanction orders; and (6) orders finding a child or parent in contempt.

Any order that does not dispose of the entire matter as to any party is a nonfinal order. Examples of nonfinal orders include (1) detention orders, (2) decisions on pretrial motions (such as denials of suppression motions), and (3) orders granting or denying waiver of juvenile court jurisdiction. Although an order waiving juvenile court jurisdiction might seem to “dispose of the entire matter” in juvenile court, the Wisconsin Supreme Court has characterized orders granting or denying waiver as nonfinal orders. [State ex rel. A.E. v. Circuit Ct., 94 Wis. 2d 98, 288 N.W.2d 125, on reconsideration, 94 Wis. 2d 105a, 105a–105b, 292 N.W.2d 114 \(1980\)](#).

Final orders may be appealed as a matter of right. [Wis. Stat. § 808.03\(1\)](#). Nonfinal orders may be immediately appealed only with the court of appeals’ permission. [Wis. Stat. § 808.03\(2\)](#).

**Note.** If the court of appeals denies interlocutory review (or if counsel does not seek interlocutory review), some nonfinal orders are still reviewable after entry of a final order. For example, in a delinquency case, the denial of a suppression motion is reviewable upon entry of the dispositional order, even in cases involving an admission or a no-contest plea. [Wis. Stat. §§ 808.03\(3\), 938.297\(8\)](#). Similarly, a decision waiving a juvenile into adult court is reviewable upon conviction in adult court (although not after an admission or no-contest plea); as discussed in section [13.10](#), *infra*, however, counsel generally should not wait to appeal a waiver decision. Other kinds of nonfinal orders, such as detention orders, will generally be moot by the time of entry of a final order.

The same event—entry of the appealable order—triggers the time for initiating an appeal from either a final or nonfinal order. The court enters an order when the court files the signed, written order in the office of the clerk of court. [Wis. Stat. § 807.11](#). Therefore, the oral pronouncement of judgment does not constitute an order from which a party can initiate an appeal.

#### III. Interlocutory Appeals [§ 13.3]

## A. Procedure [§ 13.4]

Trial counsel may seek review of a nonfinal order by interlocutory (i.e., permissive) appeal under [Wis. Stat.](#) § 808.03(2). Because of the permissive nature of appeals of nonfinal orders, trial counsel must file with the court of appeals a petition seeking leave to appeal the order. (See the sample petition for leave to appeal a nonfinal order in section [13.17](#), *infra*.)

The court of appeals can grant interlocutory review if it determines that an appeal will (1) materially advance the termination of the litigation or clarify further proceedings in the litigation, (2) protect the petitioner from substantial or irreparable injury, or (3) clarify an issue of general importance in the administration of justice. [Wis. Stat.](#) § 808.03(2)(a), (b), (c).

To initiate an interlocutory appeal, defense counsel must, within 14 days after entry of the order, file with the court of appeals the petition for leave to appeal a nonfinal order. [Wis. Stat.](#) § 809.50(1). The court, on its own motion or upon good cause shown by motion, may extend the 14-day period for filing. [Wis. Stat.](#) § 809.82(2). If the 14-day deadline has been missed, a motion to enlarge should be filed as soon as possible. A delay of more than a few days will likely result in denial of any extension. *See* Heffernan, *supra* § [13.1](#), § 9.8.

Trial counsel must electronically file (e-file) the petition in the court of appeals. [Wis. Stat.](#) §§ 809.50(1m), 809.801(5)(d). If an otherwise self-represented person is receiving limited-scope representation from an attorney who has filed a limited appearance under [Wis. Stat.](#) § 802.045(2), then a copy must also be served on the attorney who filed the limited appearance. *See* [Wis. Stat.](#) § 801.14(2m). It should be remembered that when the child has a guardian ad litem (as in CHIPS and TPR cases, for example), the guardian ad litem is also a party. Also, if an Indian tribe has intervened under [Wis. Stat.](#) § 48.028(3)(e) or [Wis. Stat.](#) § 938.028(3)(e), the tribe is a party.

Before filing the petition, trial counsel should consider whether to bring a motion for a three-judge appellate panel. Ordinarily, cases under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938 are one-judge appeals, which means that the decisions cannot be published. [Wis. Stat.](#) §§ 752.31(2)(e), (3), 809.23(1)(b)4. If trial counsel believes that the issues raised in an appeal would otherwise meet the criteria for publication, counsel can file a motion for a three-judge panel in the court of appeals. [Wis. Stat.](#) § 809.41(1)(c). Counsel must file this motion when filing the petition for leave to appeal and, when the state is a party, service on the attorney general must be made as provided in [Wis. Stat.](#) § 809.802(2), under which the clerk of the court of appeals “opt[s] in the attorney general as an attorney for the state.” *See* [Wis. Stat.](#) §§ 809.41(1), 809.10(1)(h).

**Note.** Review of a denial of a request for judicial substitution, *see* [Wis. Stat.](#) §§ 938.29, 801.58(2), has a unique procedure. Appeal of a denial must first be made by petition to the chief judge of the judicial administrative district. *State ex rel. Mateo D.O. v. Circuit Ct.*, 2005 WI App 85, ¶ 10, 280 Wis. 2d 575, 696 N.W.2d 275. The failure to obtain review by the chief judge is akin to failure to exhaust administrative remedies and constitutes waiver of the right for appellate review. *Id.* Review of an adverse decision by the chief judge is then accomplished by a petition for a supervisory writ filed in the court of appeals. *Id.* ¶ 15. For a discussion of supervisory writs, *see* Heffernan, *supra* § [13.1](#), § 10.2.

## B. Contents of Petition [§ 13.5]

[Wis. Stat.](#) § 809.50 specifies the contents of the petition for permissive appeal and supporting memorandum. The petition must contain a statement of the issues presented, a statement of facts necessary to an understanding of the issues, a statement demonstrating the need for immediate review rather than review after entry of the final order, and a copy of the order of which trial counsel seeks review. [Wis. Stat.](#) § 809.50(1). Although not required by statute, it is recommended that counsel obtain a transcript of the circuit court’s oral ruling to include with the petition if the written order does not contain the entirety of the circuit court’s reasoning. *See* Heffernan, *supra* § [13.1](#), § 9.9. If a transcript is not yet available when filing the petition, the attorney should inform the court of appeals that a transcript has been requested and will be filed by a specific date.

Trial counsel’s petition must demonstrate that the appeal meets the criteria of [Wis. Stat.](#) § 808.03(2), as noted in section [13.4](#), *supra*. In addition, although not specifically listed under [Wis. Stat.](#) § 808.03 or [Wis. Stat.](#) § 809.50, the court of appeals also considers whether the issue presented has a “substantial likelihood of success on the merits.” *State ex rel. Hass v. Wisconsin Ct. of Appeals*, 2001 WI 128, ¶ 13, 248 Wis. 2d 634, 636 N.W.2d 707; *see also* *State v. Webb*, 160 Wis. 2d 622, 633 n.8, 467 N.W.2d 108 (1991) (discussing the types of cases “where interlocutory review is appropriate and justified”). Therefore, the petition should also address the merits.

The petition must offer more than conclusory assertions and mere citations to the criteria of [Wis. Stat.](#) § 808.03(2). Instead, trial counsel should explain specifically why the particular case satisfies the criteria. The petition cannot exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. [Wis. Stat.](#) § 809.50(1); *see also* [Wis. Stat.](#) § 809.50(2) (providing same limits for response).



In drafting the petition, trial counsel should start from the premise that the court of appeals disfavors most interlocutory appeals. Counsel must persuade the court of appeals that the issue is unique and immediate review is necessary.

**Comment.** The court of appeals may be more likely to review a circuit court's nondiscretionary legal decision than a discretionary determination, so counsel should pay particular attention to how counsel frames the issue. For example, although the decision whether to hold a child in secure detention lies within the circuit court's discretion, if the court has erroneously interpreted the statute underlying that discretion, trial counsel may properly frame the issue as a legal question of statutory interpretation.

To halt either the circuit court proceedings or relevant order while the petition is pending, counsel should move the circuit court for a stay. If the circuit court does not grant a stay, counsel should include with the petition for permissive appeal a request to the court of appeals for temporary relief under [Wis. Stat.](#) § 809.52, as discussed in section [13.14](#), *infra*.

### C. Response to Petition [§ 13.6]

If counsel represents the opposing party in the circuit court, counsel must file a response to a petition for leave to appeal. This is true even if the party agrees that the court of appeals should grant review. Heffernan, *supra* § [13.1](#), § 9.10.

### D. If Court Grants Review [§ 13.7]

If the court of appeals grants review, the order granting review operates as the filing of a notice of appeal. [Wis. Stat.](#) § 809.50(3). From that point, the matter proceeds as if a notice of appeal had been filed. [Wis. Stat.](#) § 809.19 governs the requirements for briefs.

**Comment.** Counsel should keep in mind two rules unique to appeals in cases involving children. First, confidentiality must be maintained under [Wis. Stat.](#) § 809.19(1)(g). This means that all documents—including documents in the appendix—must refer to an individual by one or more initials or other appropriate pseudonym or designation rather than by full name. Also, as with the petition, *see supra* § [13.4](#), when the child has a guardian ad litem or when an Indian tribe has intervened, these are parties that must be served.

The supreme court does not ordinarily review refusals of the court of appeals to grant interlocutory review. *J.S.R. v. State (In the Int. of J.S.R.)*, 111 Wis. 2d 261, 330 N.W.2d 217 (1983). *But see State v. Jendusa*, [2021 WI 24](#), 396 Wis. 2d 94, 955 N.W.2d 777 (accepting review of court of appeals' denial of petition for permissive appeal).

### E. Appealing Orders Waiving Juvenile Court Jurisdiction [§ 13.8]

#### 1. In General [§ 13.9]

In juvenile delinquency cases, appeals of nonfinal orders waiving juvenile court jurisdiction are common. [Wis. Stat.](#) § 938.18; *see also infra* [ch. 14](#); § [13.17](#) (sample petition for leave to appeal a nonfinal order). In contrast to its treatment of other petitions seeking permissive appeal, the court of appeals as a matter of course grants petitions seeking review of waiver decisions because the Wisconsin Supreme Court has stressed the need for immediate review of these decisions to protect the juvenile from substantial or irreparable injury. *State ex rel. A.E. v. Circuit Ct.*, 94 Wis. 2d 98, 288 N.W.2d 125, *on reconsideration*, 94 Wis. 2d 105a, 105d–105e, 292 N.W.2d 114 (1980); *see also id.* at 105e–105f (Abrahamson, J., concurring on motion for reconsideration).

As with other interlocutory appeals, trial counsel must file with the court of appeals a petition for leave to appeal within 14 days after entry of the waiver order. [Wis. Stat.](#) § 809.50(1).

#### 2. Timing of Appeal [§ 13.10]

A juvenile may appeal an order waiving juvenile court jurisdiction by way of a petition for leave to file a permissive appeal, or the juvenile may wait and appeal the final judgment of conviction after sentencing in adult court. *State v. Vairin M. (In the Int. of Vairin M.)*, [2002 WI 96](#), ¶¶ 45–46, 255 Wis. 2d 137, 647 N.W.2d 208.

**Caution.** Counsel should be aware that if a juvenile pleads guilty or no contest in adult court, the juvenile waives the right to appeal the waiver decision. *See id.* ¶ 48; *State v. Kraemer*, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990).

In addition to the guilty-plea waiver rule, delaying an appeal until after the resolution of the adult criminal case has other serious disadvantages. First, the juvenile will face adult criminal proceedings and lose the benefit of confidentiality. Second, at the end of adult proceedings, the juvenile could be incarcerated for a long period pending appeal because appeals after conviction take longer than interlocutory appeals. Finally, an appellate court might be more reluctant to vacate a waiver order after the juvenile is adjudicated guilty in the criminal case.

In sum, because the juvenile in most instances will be disadvantaged by delaying an appeal until after resolution of the criminal case, review generally should occur by means of interlocutory appeal.

**Note.** In *Vairin M.*, the supreme court held that, in addition to appeal, a juvenile also has two options for review of a waiver decision in the circuit court. First, the juvenile may ask the juvenile court to reconsider its waiver order before the filing of a complaint in adult court, after which the juvenile court loses jurisdiction. *Vairin M.*, 2002 WI 96, ¶¶ 3, 31, 255 Wis. 2d 137. Second, once the criminal case has commenced, if the juvenile can point to a “new factor” relevant to the original waiver decision, the juvenile may file a motion in the adult court to transfer the matter back to the juvenile court for the filing of a motion for reconsideration. *Id.* ¶¶ 7, 54.

### 3. Standard of Review [§ 13.11]

The standard of review determines whether the court of appeals will independently review the issue presented or whether it will defer to the circuit court’s decision.

The decision whether to waive a juvenile into adult court lies within the discretion of the circuit court. *J.A.L. v. State (In the Int. of J.A.L.)*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991); *D.H. v. State (In the Int. of D.H.)*, 76 Wis. 2d 286, 302–03, 251 N.W.2d 196 (1977). Therefore, on review, the standard of review is generally whether the circuit court erroneously exercised its discretion by waiving juvenile court jurisdiction. *State v. Kraemer*, 156 Wis. 2d 761, 764, 457 N.W.2d 562 (Ct. App. 1990); see *Hefty v. Hefty*, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992) (noting that the proper term of art is “erroneous exercise of discretion” rather than “abuse of discretion”).

As with any discretionary decision, the record must show that the circuit court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *State v. Cesar G. (In the Int. of Cesar G.)*, 2004 WI 61, ¶ 42, 272 Wis. 2d 22, 682 N.W.2d 1; see also *C.D.M. v. State (In the Int. of C.D.M.)*, 125 Wis. 2d 170, 176, 370 N.W.2d 287 (Ct. App. 1985) (noting, in the waiver context, that the decision must be based on the statutory criteria). The proper standard of law is found in *Wis. Stat.* § 938.18. See *infra* [ch. 14](#). The circuit court does not erroneously exercise discretion simply by weighing each of the statutory criteria differently. *B.B. v. State (In the Int. of B.B.)*, 166 Wis. 2d 202, 209, 479 N.W.2d 205 (Ct. App. 1991). However, the supreme court engaged in a more robust reexamination of the relevant factors and reversed the circuit court’s denial of the state’s waiver petition in *State v. X.S. (In the Interest of X.S.)*, 2022 WI 49, 402 Wis. 2d 481, 976 N.W.2d 425. The dissent in *X.S.* concluded the majority’s analysis was conducted “afresh” without proper deference to the circuit court. *Id.* ¶ 72 (Hagedorn, J., dissenting).

If the court’s waiver decision rests on a misinterpretation of statute or some other legal error, the appellant may be able to characterize the appeal as a question of law. By doing so, the appellant may obtain independent review of the lower court’s decision.

## IV. Appeals of Final Orders [§ 13.12]

Appeals of final orders under the Children’s Code and the Juvenile Justice Code qualify as appeals as of right, which are generally governed by the same appellate rules governing appeals of criminal cases. See *Wis. Stat.* § 809.30.

Just as trial counsel must file a notice of intent to pursue postconviction relief from the judgment of conviction in criminal cases, trial counsel must also file within 20 days after the final adjudication in juvenile court a notice of intent to pursue postdispositional relief on behalf of any client who wishes to appeal. *Wis. Stat.* § 809.30(2)(b). In TPR cases, trial counsel must file a notice of intent within 30 days after the date of entry of the TPR order. *Wis. Stat.* §§ 48.43(6)(a), 809.107(2)(am), (bm); see also *infra* [§ 13.13](#). Regardless of the type of case, counsel must file the notice of intent with the clerk of circuit court (*not* the court of appeals) and serve the notice on the prosecuting attorney and all parties (or their counsel). *Wis. Stat.* §§ 809.30(2)(b), 809.107(2)(bm).

**Comment.** Trial counsel should note the difference between a notice of intent and a notice of appeal. Compare *Wis. Stat.* § 809.30(2)(b), with *Wis. Stat.* § 809.30(2)(h). A notice of intent begins the appellate process and results in the appointment of appellate counsel to review the case for a defendant who requests public defender representation for the appeal. *Wis. Stat.* § 809.30(2)(e). In contrast, appellate counsel files a notice of appeal only after reviewing the transcripts and the circuit court case record, and after the client has

decided actually to pursue an appeal. [Wis. Stat.](#) § 809.30(2)(h). Trial counsel must first file a notice of intent, *not* a notice of appeal, when appealing a final order.

Trial counsel who misses the deadline for filing a notice of intent under [Wis. Stat.](#) § 809.30(2)(b) can seek an extension for good cause from the court of appeals to file the notice. [Wis. Stat.](#) § 809.82(2).

## V. Appeals of Termination-of-Parental-Rights Orders [§ 13.13]

Appeals of final orders in TPR cases are governed by [Wis. Stat.](#) § 809.107. The procedures in TPR appeals are different than in criminal appeals and include shorter deadlines.

As noted in section [13.12](#), *supra*, if a client wishes to appeal from a TPR order, trial counsel must file a notice of intent to pursue postdisposition or appellate relief within 30 days after the entry of the written TPR order. [Wis. Stat.](#) §§ 48.43(6)(a), 808.04(7m), 809.107(2)(am), (bm).

[Wis. Stat.](#) § 809.107(2)(bm) sets forth what the notice of intent must contain. The notice of intent must be filed with the clerk of circuit court (not the court of appeals), and a copy of the notice must be served on the person representing the interests of the public, opposing counsel, the guardian ad litem, the child's parent, and any guardian or custodian. [Wis. Stat.](#) § 809.107(2)(bm). The filing of the notice of intent in the circuit court is what gives the appellate court jurisdiction in a TPR case. *Carla B. v. Timothy N. (In re Termination of Parental Rts. to Jessica N.)*, 228 Wis. 2d 695, 598 N.W.2d 924 (Ct. App. 1999). A prematurely filed notice of intent to appeal will be deemed timely and filed on the date the written judgment is entered. [Wis. Stat.](#) §§ 808.04(8), 809.107(2)(bm), (c). A notice of intent for a TPR case is unique in that it must include both the signature of the appellant, other than the state, and the signature of the appellant's attorney, if the appellant is represented by counsel. [Wis. Stat.](#) § 809.107(2)(bm)6.

**Note.** Guardianship of the child is often transferred to the Department of Children and Families (DCF) before a party appeals a TPR order. In such cases, the DCF must be served with the notice of intent. Because service of the notice of intent cannot be accomplished through the e-filing system, service by traditional methods is required, using the following address: Wisconsin Department of Children and Families—Public Adoption, P.O. Box 8916, Madison, WI 53708-8916.

Within 5 days after the filing of the notice of intent, the clerk of circuit court will send a copy of the notice of intent, a copy of the TPR order, and a list of the court reporters for all court hearings in the case to the state public defender's appellate intake office, if the appellant requests representation by the state public defender. [Wis. Stat.](#) § 809.107(3)(a). If the appellant does not request public defender representation, the clerk provides the appellant or the appellant's privately retained counsel with a copy of the TPR order and a list of the court reporters for all court hearings in the case. [Wis. Stat.](#) § 809.107(3)(b).

Within 15 days after receiving these materials from the clerk of circuit court, the state public defender's office must appoint counsel for the appellant and order transcripts of the court hearings from the court reporters and a copy of the circuit court case record. [Wis. Stat.](#) § 809.107(4)(a). A privately retained attorney representing an appellant must order the transcripts and court record within 15 days after filing of the notice of intent under [Wis. Stat.](#) § 809.107(2)(bm). [Wis. Stat.](#) § 809.107(4)(b). The transcripts and court record must be served on counsel within 30 days after they are requested. [Wis. Stat.](#) § 809.107(4m). Service is accomplished when the court reporter files the transcript with the circuit court and grants counsel electronic access to the transcript. [Wis. Stat.](#) § 801.18(6)(a), (15)(b).

If, after review of the case and consultation, the client and counsel decide to appeal the TPR order, the appellant must file a notice of appeal in the circuit court within 30 days after service of the transcripts or the circuit court record, whichever is later. [Wis. Stat.](#) §§ 809.107(5)(a), 809.10(1). The notice-of-appeal deadline in a case under [Wis. Stat.](#) ch. 48 or 938 is extendable by motion for good cause. [Wis. Stat.](#) § 809.82(2)(b). If a person decides not to file a notice of appeal, after requesting transcripts and the circuit court case record, that person must notify the parties of this decision within 30 days after the service of the transcripts and court record. [Wis. Stat.](#) § 809.107(5)(am).

A notice of appeal must comply with [Wis. Stat.](#) § 809.10 and be served on the same parties as required for the notice of intent. [Wis. Stat.](#) § 809.107(5)(a), (2)(bm). Within 15 days after the filing of the notice of appeal, the clerk of circuit court transmits the court record of the case to the court of appeals. [Wis. Stat.](#) § 809.107(5)(b). Within 5 days after filing the notice of appeal, counsel must request a copy of the transcripts for each of the parties to the appeal and make arrangements to pay for them; also within 5 days, counsel must file a statement on transcript with the circuit court. [Wis. Stat.](#) § 809.107(5)(c), (d). For users of the e-filing system in the circuit court, receipt of the statement on transcript constitutes service, but paper parties must be served by traditional methods (other than e-filing). [Wis. Stat.](#) § 809.107(5)(dm); see also [Wis. Stat.](#) § 809.01(25) (defining "paper party"), (31) (defining "traditional methods"). The court reporters then have 5 days after the date requested to serve copies of the transcripts on the named parties. [Wis. Stat.](#) § 809.107(5)(e). A notice of appeal for a TPR case is

unique in that it must include both the signature of the appellant, other than the state, and the signature of the appellant's attorney, if the appellant is represented by counsel. [Wis. Stat.](#) § 809.107(5)(a).

Although [Wis. Stat.](#) § 809.107(5)(a) requires that the appellant sign the notice of appeal, counsel must also comply with the rules of confidentiality in TPR proceedings. *See infra* [ch. 15](#). Counsel should have the client sign the notice of appeal and keep the original copy in the case file. Counsel should then submit a redacted version of the client's signature (redacting all but the first letter of each name) and note in a footnote that the appellant's signature has been redacted to comply with the confidentiality requirements in cases involving children.

If the issue for appeal requires postjudgment fact-finding, then the appellant must file, in the court of appeals, a motion for remand within 15 days after the filing of the record on appeal. [Wis. Stat.](#) § 809.107(6)(am). The motion for remand must raise the issue that requires the additional fact-finding, request that the court of appeals retain jurisdiction over the appeal, and remand the case to the circuit court to hear and decide the issue. *Id.* If the court of appeals grants the motion, the court will set deadlines for the circuit court to hear and decide the issue, for the appellant to request the transcript of the hearing, for the court reporter to file and serve the transcript, for the circuit court to transmit the record to the court of appeals, and for the appellant to file a brief following the return of the record to the court of appeals. *See id.* A motion for remand must also include an affidavit. In the affidavit, counsel must affirm under [Wis. Stat.](#) § 802.05(2) that, to the best of counsel's knowledge, information, and belief, remand is warranted and is not being sought to cause unnecessary delay. [Wis. Stat.](#) § 809.107(6)(am).

**Note.** Counsel does not need to file another notice of appeal after post-remand proceedings. Instead, the court of appeals retains jurisdiction over the appeal. *See id.*

**Note.** If a party challenges the construction or constitutionality of a statute or alleges a statute's preemption by federal law, that party must serve the attorney general and legislative leaders with "a copy of the proceeding." [Wis. Stat.](#) § 893.825(1), (2) (listing speaker of the assembly, president of the senate, and senate majority leader as legislators requiring service).

**Practice Tip.** If counsel represents an appellant in a situation in which multiple cases were resolved together (i.e., if parental rights were terminated for more than one child), counsel will need to file separate notices of appeal for each circuit court case. But counsel may wish to move to consolidate the appeals given the overlap in issues and in record items. [Wis. Stat.](#) § 809.10(3).

A motion for remand should contain as much detail as possible and set out with specificity why further fact-finding is necessary. Counsel can then affirm that the motion for remand sets out the facts with specificity in an affidavit without repeating or having to clarify the motion for remand in the affidavit.

Examples of issues that may require fact-finding include the following: whether the client knowingly and voluntarily entered a no-contest plea or a stipulation to the grounds for TPR; proper service or notice issues in default proceedings; and ineffective assistance of counsel claims. In addition, if there are facts outside the circuit court record that are relevant to the appeal, a motion for remand should be filed.

**Practice Tip.** The pleading, burden-shifting, and proof requirements under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), apply to motions to withdraw a no-contest plea or stipulation on the ground that a circuit court failed in its mandatory duties under [Wis. Stat.](#) § 48.422 (which governs hearings on TPR petitions) and the parent did not understand the missing information. *See Waukesha Cnty. v. Steven H. (In re Termination of Parental Rts. of Brittany Ann H.)*, 2000 WI 28, ¶¶ 42–43, 233 Wis. 2d 344, 607 N.W.2d 607, withdrawn in part on other grounds by *St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D. (In re Termination of Parental Rts. to Matthew D.)*, 2016 WI 35, ¶¶ 2, 4 nn.3–4, 368 Wis. 2d 170, 880 N.W.2d 107. When bringing such claims, counsel must file a remand motion in the court of appeals and file a postjudgment motion in the circuit court.

Subsequent proceedings in appeals of TPR cases are governed by civil appellate procedure, *see* [Wis. Stat.](#) §§ 809.10–.26, and the rules for supreme court review, *see* [Wis. Stat.](#) §§ 809.60–.64, with the following exceptions. The appellant's brief must be filed within 15 days after the court record is filed in the court of appeals. [Wis. Stat.](#) § 809.107(6)(a). The respondent may file a response brief within 10 days from the later of the date of service of the appellant's brief or the date of service of the guardian ad litem's brief, if the guardian ad litem takes the appellant's position. [Wis. Stat.](#) § 809.107(6)(b). The appellant may file a reply brief or a statement that a reply will not be filed within 10 days after the service of the respondent's brief or the guardian ad litem's brief, if the guardian ad litem takes the respondent's position. [Wis. Stat.](#) § 809.107(6)(c). These 10-day time periods do not include weekends or holidays. *See* [Wis. Stat.](#) § 801.15(1)(b) ("When the period of time prescribed or allowed is less than 11 days, Saturdays, Sundays and holidays shall be excluded in the computation."). Time limits for briefs filed by a guardian ad litem depend on whether the guardian ad litem is aligned with the appellant or the respondent. If aligned with the appellant, the guardian ad litem's brief must be filed within 15 days after the filing of the record on appeal (i.e., the same time frame as the appellant's). If aligned with the respondent, the guardian ad litem's brief must be filed within 10 days after service of the



appellant's brief (i.e., the same time frame as the respondent's). [Wis. Stat.](#) § 809.107(6)(d). If the guardian ad litem chooses not to participate in an appeal, the guardian ad litem must file a statement of reasons for not participating within 15 days after the filing of the notice of appeal. *Id.*; see also [Wis. Stat.](#) § 48.235(7).

Appeals in TPR cases are given preference, and the court of appeals should “ensure[] that a decision is issued within 30 days after the filing of the appellant's reply brief or statement that a reply brief will not be filed.” [Wis. Stat.](#) § 809.107(6)(e). But the court of appeals regularly grants itself extensions of the 30-day deadline. See, e.g., *Rhonda R.D. v. Franklin R.D. (In the Int. of Christopher D.)*, [191 Wis. 2d 680](#), 694, 530 N.W.2d 34 (Ct. App. 1995) (citing [Wis. Stat.](#) § 809.82(2)(a)). Any petition for review from an adverse decision of the court of appeals must be filed in the Wisconsin Supreme Court within 30 days after the date of the decision, and such petitions are likewise given preference. [Wis. Stat.](#) § 809.107(6)(f). This 30-day petition-for-review deadline is jurisdictional and is *not* extendable. [Wis. Stat.](#) §§ 809.62(1m), 808.10; see *First Wis. Nat'l Bank of Madison v. Nicholaou*, [87 Wis. 2d 360](#), 274 N.W.2d 704 (1979). Unlike petitions for review in other types of cases, a petition for review in a TPR case must be signed by both the petitioner (for a party other than the state) and the petitioner's counsel, if any. [Wis. Stat.](#) § 809.107(6)(f).

**Note.** A motion for reconsideration to the court of appeals is not permitted in a TPR appeal. [Wis. Stat.](#) § 809.24(4).

Although [Wis. Stat.](#) § 809.107(6)(f) requires that the petitioner sign the petition for review, counsel must also comply with the confidentiality rules in TPR cases. Counsel should have the client sign the petition for review and keep the original copy in the case file. Counsel should then submit a redacted version of the client's signature (redacting all but the first letter of each name) and note in a footnote that the parent's signature has been redacted to comply with the confidentiality requirements in cases involving children.

**Practice Tip.** Given that the deadline for filing a petition for review is not extendable, if counsel cannot obtain the client's signature by the deadline but knows that the client wishes to petition the supreme court for review, counsel should file the petition for review signed only by counsel. Counsel can note that counsel is filing a nonconforming petition for review and move for an extension to file the client's signature portion of the petition.

If appointed counsel believes that a direct appeal on behalf of the person would be frivolous and without any arguable merit and the client either requests a no-merit report or declines to consent to the closing of the file without any further representation, many procedures under [Wis. Stat.](#) § 809.32 for no-merit reports apply. [Wis. Stat.](#) § 809.107(5m). A significant exception is the 180-day deadline for no-merit reports under [Wis. Stat.](#) § 809.32. In a TPR appeal, counsel must file a no-merit report within 15 days after the record is filed. [Wis. Stat.](#) § 809.107(5m). Other requirements of [Wis. Stat.](#) § 809.32 apply, including the substantive requirements of [Wis. Stat.](#) § 809.32(1)(a), counseling and notification requirements of [Wis. Stat.](#) § 809.32(1)(b), and certification requirement of [Wis. Stat.](#) § 809.32(1)(c).

Counsel must serve a copy of the court record and transcripts on the client when the no-merit report is served. [Wis. Stat.](#) § 809.107(5m). The client may file a response within 10 days after service of the report, which the clerk must forward to counsel within 5 days after the filing with the clerk's office. See *id.* Counsel may file a supplemental no-merit report within 10 days from the receipt of the no-merit response. See *id.*

**Note.** [Wis. Stat.](#) § 48.46 contains procedures for petitioning the circuit court for relief from judgment terminating parental rights. A parent who contested the TPR may petition the court on the ground that new evidence has been discovered affecting the advisability of the original adjudication. [Wis. Stat.](#) § 48.46(1). The petition may be filed at any time within one year after the order, except that, if an adoption order is entered within one year, the petition must be filed before entry of the adoption order or within 30 days after entry of the TPR order, whichever is later. [Wis. Stat.](#) § 48.46(1m). A common situation in which relief is sought occurs when a parent failed to appear at a hearing, resulting in a default judgment, and the parent seeks to present facts supplying a justifiable excuse for failing to appear. [Wis. Stat.](#) §§ 48.46(2), 806.07.

A parent who consented to or did not contest the TPR order may move for relief from judgment on the grounds specified in [Wis. Stat.](#) § 806.07(1)(a), (b), (c), (d), or (f). [Wis. Stat.](#) § 48.46(2). The motion must be filed within 30 days after the entry of the judgment or order, unless the parent timely files a notice of intent to pursue postjudgment relief, in which case the motion must be filed within the [Wis. Stat.](#) § 809.107(5) deadlines. *Id.*

## VI. Stays Pending Appeal [§ 13.14]

When trial counsel files either a petition seeking interlocutory review or a notice of intent, the filing does not automatically stay the proceedings pending appeal. [Wis. Stat.](#) § 808.07(1). Trial counsel should carefully consider seeking a stay of further proceedings or a stay of the judgment or relevant order in the circuit court. If the circuit court declines to grant a stay, counsel may seek a stay from the court of appeals. [Wis. Stat.](#) § 808.07(2).

**Comment.** A stay pending appeal is different from an indefinite stay of all or part of a dispositional order under [Wis. Stat.](#) ch. 938. See [Wis. Stat.](#) § 938.34(16); *State v. Cesar G. (In the Int. of Cesar G.)*, 2004 WI 61, 272 Wis. 2d 22, 682 N.W.2d 1; see also [ch. 11](#), *supra*, for further discussion of *Cesar G.*

In some cases, trial counsel must seek a stay or the issue will be moot before the court of appeals has the opportunity to review it. For example, if trial counsel seeks interlocutory review of a detention order or final review of a sanction order without receiving a stay of the order, the issue will become moot upon the child's release from detention. See [Wis. Stat.](#) § 938.355(6) (regarding sanctions). See [chapter 16](#), *infra*, for a discussion of the use of sanctions and contempt in juvenile cases.

In appeals of orders waiving juvenile court jurisdiction, trial counsel must seek a stay of proceedings to prevent the loss of confidentiality that will occur when the prosecutor charges the juvenile as an adult or, at least, to keep the adult court proceedings from continuing during the appeal.

In addition, in CHIPS, JIPS, UCHIPS, or delinquency cases in which a child has been removed from the parent's home or a delinquent juvenile has been placed in a juvenile correctional facility pursuant to a one-year dispositional order, counsel might seek a stay because an issue might become moot before the appellate court can review the case.

[Wis. Stat.](#) § 808.07(2) governs relief pending appeal, including any stay of proceedings or stay of judgment. An appeal is pending for the purpose of this section once trial counsel files a notice of intent to pursue postdisposition relief. See *State v. Firkus*, 119 Wis. 2d 154, 350 N.W.2d 82 (1984) (interpreting phrase "upon appeal" in [Wis. Stat.](#) § 969.01(2)(b)) (note that [Wis. Stat.](#) § 969.01(2)(b) is no longer a mandatory provision—the statute has since been amended to give the circuit court discretion in allowing release of misdemeanants pending appeal, see 1997 Wis. Act 232).

Although [Wis. Stat.](#) § 808.07(2) grants both the circuit court and the court of appeals the authority to stay the proceedings or judgment, this must be read alongside [Wis. Stat.](#) § 809.12, which provides that the party seeking relief pending appeal under [Wis. Stat.](#) § 808.07 "shall" file the motion in the circuit court "unless it is impractical" to do so. The court of appeals has interpreted "impractical" narrowly, so trial counsel should generally seek a stay of proceedings or a stay of judgment in the circuit court. Heffernan, *supra* § 13.1, § 14.2. The court of appeals has found impracticality when the circuit court is physically unable to grant relief because of illness, vacation, or other absence, and when the circuit court has explicitly stated on the record that it will not grant such relief under any circumstances. *Id.* If the circuit court denies a motion for relief pending appeal, counsel can *then* file a motion with the court of appeals under [Wis. Stat.](#) §§ 808.07(2) and 809.12 for review of the denial. *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995). The standard for the motion in the court of appeals is whether the circuit court erroneously exercised its discretion in denying the stay. *Id.* Therefore, if the written order does not contain all of the circuit court's reasoning, the party seeking a stay should include a transcript of any oral ruling of the circuit court with the stay motion. Heffernan, *supra* § 13.1, § 14.3. If a transcript is not yet available, counsel should inform the court of appeals that a transcript has been requested and will be filed by a specific date.

[Wis. Stat.](#) § 809.52 governs relief pending resolution of a petition for leave to appeal a nonfinal order (petition for interlocutory appeal) or for a supervisory writ. When trial counsel seeks a stay under this section, trial counsel should make this request directly in the petition to the court of appeals and should make the request prominent so that the court of appeals can immediately act on it. [Wis. Stat.](#) § 809.52. Counsel may include the request in the title, which might read "Petition for Leave to Appeal and Request for Temporary Relief." Heffernan, *supra* § 13.1, § 9.12. Unlike [Wis. Stat.](#) § 809.12, [Wis. Stat.](#) § 809.52 does not require that the party seek relief in the circuit court before turning to the court of appeals. However, as a practical matter, it makes sense to seek temporary relief in the circuit court first. *Id.*

## VII. Practice Forms [§ 13.15]

### A. Standard Court Forms [§ 13.16]

Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from local clerks of court or through the Wisconsin Court System's website, at <https://www.wicourts.gov/forms1/circuit.htm> (updated Feb. 13, 2022). A list of those standard court forms is included in [appendix B](#), *infra*.

In appeals in children's or juvenile cases, attorneys should be aware of the following standard court forms: [JC-1644](#), entitled Notice of Right to Seek Postdisposition Relief (Termination of Parental Rights), and [JC-1757](#), entitled Notice of Right to Seek Post-Judgment Relief. [JC-1644](#) provides a parent with notification of the applicable time periods for seeking postdisposition relief after entry of an order terminating parental rights. [JC-1757](#) provides a juvenile with notification of the applicable time periods for seeking postjudgment relief after entry of a dispositional order.

**Caution.** The form in section [13.17](#), *infra*, is offered as a practice guide. Always check original sources of authority for current law. When using the sample form, also check local practice and adapt the form language to fit the client's circumstances.



**B. Petition for Leave to Appeal a Nonfinal Order (Form JUV-0039) [§ 13.17]**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT (number)

In the Interest of  
(Juvenile's first name and last initial)

A Person Under the Age of 17:

(Juvenile's first name and last initial)

Petitioner

v.

County Case No. \_\_\_\_\_

State of Wisconsin

Respondent



## PETITION FOR LEAVE TO APPEAL A NONFINAL ORDER <sup>[48]</sup>

*(Juvenile's first name and last initial)*, by *(his) (her)* attorney, petitions the Court of Appeals, District \_\_\_\_\_, for leave to appeal from a nonfinal order in case number \_\_\_\_\_, entered on *(date)*, in *(name of county)* County Circuit Court, Judge *(judge's name)*, presiding, in which the court *(describe order, e.g., order waiving juvenile court jurisdiction; denying a motion to suppress the juvenile's confession as involuntary; denying a motion to dismiss the delinquency petition/detention order for lack of notice/probable cause)*.

The reasons supporting immediate review are as follows:

- a. *(State procedural history of case.)*
- b. *(State issues presented by this appeal and relevant case law.)*
- c. *(State why the issues should be decided now rather than after final judgment, based on the criteria of [Wis. Stat. §§ 808.03\(2\), 809.50](#).)*
- d. *(In juvenile waiver appeals, cite to [State ex rel. A.E. v. Circuit Court, 94 Wis. 2d 98, 288 N.W.2d 125 \(1980\)](#).)*

**[Add if appropriate]** Pursuant to [Wis. Stat. § 809.52](#), <sup>[29]</sup> petitioner further requests that the court *(specify desired temporary relief, e.g., stay, release from detention)* pending disposition of this petition.

1. *(State specific facts showing why temporary relief is necessary.)*
- 2.

Dated \_\_\_\_\_

*(Firm/Office name)*

Attorneys for *(juvenile's name)*

\_\_\_\_\_  
*(Attorney's name)*

*(Attorney's address)*

*(Attorney's telephone number)*

*(Attorney's email address)*

State Bar No. \_\_\_\_\_

## Supplement Chapter 14

---

### Waiver into Adult Court

---

Book sections supplemented: [14.1](#) and [14.3](#)

#### 14.1 Scope of Chapter

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272.

#### 14.3 [Procedure] Nature and Subjects of Waiver Hearing

[Page 3: Amended URL for Trial Manual for Defense Attorneys in Juvenile Delinquency Cases in third-to-last paragraph in section](#)

Although the age of the juvenile and the type of offense the juvenile allegedly committed can trigger the filing of a petition seeking waiver of juvenile court jurisdiction, the waiver decision itself depends on many other criteria, most of which focus on the individual juvenile. The decision whether to waive juvenile court jurisdiction rests on factual determinations and the application of legal standards to those facts. Because of this procedure, due process requires that the juvenile have the right to a hearing, to effective assistance of counsel, and to limited discovery. *See generally* Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* ch. 13 (2015), <https://www.defendyouthrights.org/wp-content/uploads/2015/09/Hertz-Trial-Manual-Update.pdf>; *see also* *Kent v. United States*, [383 U.S. 541](#) (1966) (holding that waiver proceeding is critically important stage requiring due-process protections for child).

## Chapter 14

### Waiver into Adult Court

---

#### I. [Scope of Chapter](#)

##### [§ 14.1]

This chapter discusses the procedure for waiving a juvenile into adult court, the criteria the juvenile court must consider before ordering waiver, and the role of defense counsel in challenging waiver.<sup>1</sup>

Under [Wis. Stat.](#) § 938.18, the juvenile court can, in its discretion, waive jurisdiction over a juvenile alleged to have committed a delinquent act. Waiver allows the state to prosecute the juvenile in adult court. The court can waive only certain categories of juveniles, with the availability of the waiver option depending on the age of the juvenile and on the nature of the delinquent act.

**Note.** Wisconsin has codified the Indian Child Welfare Act in the Juvenile Justice Code. [Wis. Stat.](#) § 938.028. Wisconsin courts should determine jurisdiction over Indian children early in all cases. Attorneys should ask each client early in a juvenile case whether the client is enrolled in a tribe.

#### II. Procedure [§ 14.2]

##### A. [Nature and Subjects of Waiver Hearing](#)

##### [§ 14.3]

In Wisconsin, the court can waive the following juveniles into adult court:

1. If 14 years old or older, juveniles alleged to have violated [Wis. Stat. § 940.03](#) (felony murder), [Wis. Stat. § 940.06](#) (second-degree reckless homicide), [Wis. Stat. § 940.225\(1\) or \(2\)](#) (first- or second-degree sexual assault), [Wis. Stat. § 940.305](#) (taking hostages), [Wis. Stat. § 940.31](#) (kidnapping), [Wis. Stat. § 943.10\(2\)](#) (armed burglary), [Wis. Stat. § 943.32\(2\)](#) (armed robbery), [Wis. Stat. § 943.87](#) (robbery of a financial institution), or [Wis. Stat. § 961.41\(1\)](#) (manufacture, distribution, or delivery of a controlled substance or controlled substance analog), *see* [Wis. Stat. § 938.18\(1\)\(a\)](#);
2. If 14 years old or older, juveniles alleged to have committed a felony at the request, or for the benefit, of a criminal gang, [Wis. Stat. § 938.18\(1\)\(b\)](#); *see* [Wis. Stat. § 939.22\(9\)](#) (defining “criminal gang”); and
3. If 15 years old or older, juveniles alleged to have violated any state criminal law, [Wis. Stat. § 938.18\(1\)\(c\)](#).

**Note.** A juvenile subject to a delinquency petition who absconds and does not return until the individual is an adult may be waived into adult court even though the individual was not eligible for waiver when the delinquency petition was originally filed. [State v. Pablo R.](#) (*In the Int. of Pablo R.*), 2000 WI App 242, 239 Wis. 2d 479, 620 N.W.2d 423.

A waiver petition is based on the juvenile’s age at the time of the alleged offense, not on the date of the filing of the petition. *State v. Jason K.* (*In the Int. of Jason K.*), No. 00-2238, 2001 WL 80028 (Wis. Ct. App. Jan. 31, 2001) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)). This should be distinguished from cases of delayed reporting or periods of absconding. In *State v. Sanders*, [2018 WI 51](#), 381 Wis. 2d 522, 912 N.W.2d 16, the Wisconsin Supreme Court reaffirmed that, in delinquency cases, the defendant’s age at the time the defendant is charged, not the defendant’s age at the time of committing the underlying conduct, determines the circuit court’s ability to hear the case as a criminal, juvenile delinquency, or JIPS matter. This allowed charging of a 19-year-old defendant as an adult for conduct that allegedly occurred when he was 8 or 9 years old.

By permitting juvenile courts to waive jurisdiction over a juvenile of a certain age who has committed a particular crime, the Wisconsin Legislature has removed the “protective shield against criminal responsibility” for those juveniles for whom the juvenile court decides that treatment as an adult would be more appropriate. [Mikulovsky v. State](#), 54 Wis. 2d 699, 707, 196 N.W.2d 748 (1972). The U.S. Constitution does not restrict a state’s right to define the boundaries of juvenile court jurisdiction, as long as the state does not apply an arbitrary or discriminatory classification. [Bendler v. Percy](#), 481 F. Supp. 813, 815–16 (E.D. Wis. 1979). An individual who commits a criminal act does not have a constitutional right, based on age, to treatment differing from that accorded other offenders. *Id.*

A waiver-of-jurisdiction proceeding is a juvenile proceeding, but the court must have competency to act in that proceeding. The court acquires competency when all statutory requirements are met at each stage of the proceeding. [Michael J.L. v. State](#) (*In the Int. of Michael J.L.*), 174 Wis. 2d 131, 496 N.W.2d 758 (Ct. App. 1993) (interpreting [Wis. Stat. ch. 48](#) provisions in effect before creation of [Wis. Stat. ch. 938](#)). *But see* [Wis. Stat. § 938.315\(3\)](#) (“Failure by the court or a party to act within any time period specified in this chapter does not deprive the court of personal or subject-matter jurisdiction or of competency to exercise that jurisdiction.”).

The waiver proceeding is distinct from the delinquency proceeding. The juvenile court’s function at the waiver stage consists simply of determining whether to exercise juvenile court jurisdiction or to send the case to adult court for prosecution. [State v. Kastner](#), 156 Wis. 2d 371, 374, 457 N.W.2d 331 (Ct. App. 1990).

Although the age of the juvenile and the type of offense the juvenile allegedly committed can trigger the filing of a petition seeking waiver of juvenile court jurisdiction, the waiver decision itself depends on many other criteria, most of which focus on the individual juvenile. The decision whether to waive juvenile court jurisdiction rests on factual determinations and the application of legal standards to those facts. Because of this procedure, due process requires that the juvenile have the right to a hearing, to effective assistance of counsel, and to limited discovery. *See generally* Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* ch. 13 (2015), <https://njdc.info/wp-content/uploads/2015/09/Hertz-Trial-Manual-Update.pdf>; *see also* [Kent v. United States](#), 383 U.S. 541 (1966) (holding that waiver proceeding is critically important stage requiring due-process protections for child).

As part of the juvenile’s due-process right to the exercise of juvenile jurisdiction by the court, the state cannot manipulate the system to avoid juvenile jurisdiction by purposeful delay in filing charges. Delay for purposes of investigation or other legitimate reasons, however, is allowed. The juvenile bears the burden of production to show that any delay was for manipulative purposes. *See* [State v. Velez](#), 224 Wis. 2d 1, 589 N.W.2d 9 (1999); *State v. Baumann*, No. 03-3114-CR, 2004 WL 1171344 (Wis. Ct. App. May 19, 2004) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)). The state then bears the burden of proof to establish a lack of manipulative intent. *Velez*, 224 Wis. 2d at 15–17; [State v. Bergwin](#), 2010 WI App 137, ¶ 11, 329 Wis. 2d 737, 793 N.W.2d 72. In [Bergwin](#), 2010 WI App 137, 329 Wis. 2d 737, the

court of appeals found that the state improperly influenced a juvenile intake worker's recommendation when the state told the intake worker it was planning to file adult charges because the juvenile was going to turn 17 within the 40-day period for intake.

When a juvenile court waives a juvenile into adult court, the juvenile court waives subject-matter jurisdiction, not personal jurisdiction. *Gibson v. State*, 47 Wis. 2d 810, 815, 177 N.W.2d 912 (1970).

## B. Initiating Waiver Proceeding [§ 14.4]

### 1. Filing Petition [§ 14.5]

The district attorney or the juvenile may file the petition for waiver of jurisdiction. [Wis. Stat.](#) § 938.18(2). In certain circumstances, a juvenile might want to be waived into adult court. For example, it may be likely that the juvenile would receive a correctional placement if the case remained in juvenile court but would receive a more favorable sentence in adult court. Counsel should advise the juvenile of the disadvantages to filing a waiver petition or agreeing to waiver. Also, the court may initiate a petition for waiver, but if that occurs, the judge must disqualify himself or herself from any future proceedings on the case. [Wis. Stat.](#) § 938.18(2). In general, a petition for waiver is filed along with or after the filing of a petition alleging delinquency. A petition for waiver must be filed before the plea hearing for the delinquency petition, except that if the juvenile denies the facts of the petition and turns 17 years old before an adjudication, the petition for waiver of jurisdiction may be filed at any time before the adjudication. *Id.*

**Practice Tip.** If the state has not filed a waiver petition and the juvenile is almost 17 years old, counsel for the juvenile should consider advising the client to admit the facts alleged in the delinquency petition at the plea hearing to avoid the filing of a waiver petition later.

### 2. Contents of Petition [§ 14.6]

The waiver petition must contain a brief statement of the facts supporting the request for waiver. *Id.* The statement must identify the facts on which the state intends to rely in seeking to have the juvenile tried as an adult. *J.V.R. v. State (In the Int. of J.V.R.)*, 127 Wis. 2d 192, 200, 378 N.W.2d 266 (1985).

**Note.** In *D.H. v. State (In the Interest of D.H.)*, 76 Wis. 2d 286, 251 N.W.2d 196 (1977), the supreme court found sufficient a waiver petition that stated only that “it would be contrary to the best interests of the child or the public to dispose of the issues in the juvenile court.” In *J.V.R.*, however, in reversing a waiver decision, the supreme court distinguished *D.H.* on two grounds: (1) the state in *J.V.R.* relied only on the facts relating to the charged offense to justify waiver, and (2) the court decided *D.H.* before enactment of [Wis. Stat.](#) § 48.18(2). *J.V.R.*, 127 Wis. 2d at 200. [Wis. Stat.](#) § 48.18(2) was the predecessor to [Wis. Stat.](#) § 938.18(2).

At the first opportunity—either at the detention hearing or the plea hearing—counsel should challenge the sufficiency of both the delinquency and the waiver petitions. Counsel should renew the challenges at each court appearance. Failure to challenge the sufficiency of the petition can waive the issue. An admission or no-contest plea also waives the issue. *See supra* [ch. 7](#).

Counsel can challenge the sufficiency of a delinquency petition by contending that it fails to demonstrate probable cause that a crime was committed and that the juvenile committed it. *See supra* [ch. 7](#). Counsel can challenge a waiver petition on due-process grounds by arguing that the petition fails to provide adequate notice of the allegations to enable the parties to prepare for the waiver hearing. A court should not consider adequate a waiver petition that cites only to the allegations of the delinquency petition and does not set forth facts relevant to the criteria for waiver articulated under [Wis. Stat.](#) § 938.18(5). *See J.V.R.*, 127 Wis. 2d at 200. Nor should a waiver petition that merely refers to the statutory waiver criteria under [Wis. Stat.](#) § 938.18(5) suffice. *See id.* at 201–02.

A case decided after the enactment of [Wis. Stat.](#) § 938.18 found sufficient a petition that included a more extensive statement of facts than in *J.V.R.*, including the date of birth of the juvenile, the charges in the petition, a statement that the juvenile was neither mentally ill nor had a developmental disability, and a summary report, incorporated by reference, from the case manager. The case manager's report detailed the juvenile's pattern of living, prior offenses, and treatment history and provided a variety of reasons why waiver of jurisdiction was appropriate. Finally, the petition also referred to the statutory factors as applied to the juvenile. *See State v. Carlos C. (In the Int. of Carlos C.)*, No. 02-0846, 2002 WL 1857000, ¶¶ 24–27 (Wis. Ct. App. Aug. 14, 2002) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

If the state intends to show a juvenile's maturity by showing the juvenile's pattern of living, the petition must provide facts in support of this position (e.g., the juvenile lives independently from the juvenile's parents, associates with older individuals, or works). If the state intends to show that a juvenile does not have the potential for responding to treatment within the juvenile system, the petition should state the history of attempts to treat the juvenile and the juvenile's response. In other words, the petition should contain not only conclusions but

also facts supporting the conclusions. *Reggie T. v. State (In the Int. of Reggie T.)*, No. 92-1080, 1992 WL 430299 (Wis. Ct. App. Oct. 15, 1992) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). Although the court of appeals in this unpublished decision dismissed the waiver petition for failure to provide adequate notice, the court did so without prejudice and without dismissing the underlying delinquency petition. Thus, the court did not preclude the state from filing a new waiver petition containing adequate notice of the basis for waiver.

## C. Hearing on Petition [§ 14.7]

### 1. Time Periods [§ 14.8]

[Wis. Stat.](#) § 938.18 does not contain any time period for holding the waiver hearing. Because the court must hold the plea hearing in a delinquency case within 30 days after the filing of the petition (10 days for a juvenile in secure custody), [Wis. Stat.](#) § 938.30(1), and because the waiver petition must be filed before the plea hearing, defense counsel can consider arguing that the court must hold the waiver hearing before the time periods within which the plea hearing must be held.

In an unpublished decision, however, the court of appeals has held that the time periods within which the court must hold a plea hearing in a delinquency case are irrelevant when determining when the court must hold a waiver hearing. Under such reasoning, a juvenile court need not hold the waiver hearing within the 10 or 30 days mandated for the plea hearing. *State v. Charles L.S. (In the Int. of Charles L.S.)*, No. 92-1205, 1992 WL 430307 (Wis. Ct. App. Oct. 22, 1992) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *see also supra* [ch. 8](#) (plea hearing).

### 2. Notice [§ 14.9]

At least three days before the hearing, written notice must be provided to the juvenile, the juvenile's parent, guardian, or legal custodian, and the juvenile's counsel. [Wis. Stat.](#) § 938.18(3)(a).

**Note.** In an unpublished decision, the court of appeals reversed an order waiving juvenile court jurisdiction, based on the failure to mail notice of the waiver hearing to the juvenile's guardian. *State v. E.S. (In the Int. of E.S.)*, Nos. 82-758, 82-708-CR, 1982 WL 172416 (Wis. Ct. App. Aug. 26, 1982) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The court of appeals noted that a juvenile's guardian has the right to be heard on the issue of waiver and might have information relevant to the criteria of [Wis. Stat.](#) § 938.18(5)(a). The legislature has since moved some of the criteria previously listed in [Wis. Stat.](#) § 938.18(5)(a) into [Wis. Stat.](#) § 938.18(5)(am). *See* 2005 Wis. Act 344, §§ 159–160.

The notice must include the time, place, and purpose of the hearing. [Wis. Stat.](#) § 938.18(3)(a). The notice must also explain that if the juvenile wants to request a substitution of judge, the juvenile must file the request before the close of the working day preceding the scheduled day for the waiver hearing. *Id.*; [Wis. Stat.](#) § 938.29(2). The juvenile court judge can permit a request for substitution of judge on the day of the waiver hearing. [Wis. Stat.](#) § 938.29(2).

### 3. Discovery [§ 14.10]

Both statutory and constitutional provisions govern a juvenile's right to discovery before a waiver hearing. [Wis. Stat.](#) § 938.18(3)(a) requires that before the waiver hearing, a juvenile and the juvenile's counsel have access to the social records and other reports "under s. 938.293." [Wis. Stat.](#) § 938.293(2) provides that defense counsel has the right to inspect all records relating to a juvenile and relevant to the subject matter of the proceeding. The court of appeals has held that under former [Wis. Stat.](#) § 48.293(2) (the predecessor to [Wis. Stat.](#) § 938.293(2)), records "relevant to the subject matter" of a waiver proceeding include social records and reports relating to the juvenile. *T.M.J. v. State (In the Int. of T.M.J.)*, 110 Wis. 2d 7, 14, 327 N.W.2d 198 (Ct. App. 1982). In addition, materials relating to the juvenile's personality and history are discoverable in every waiver case because the juvenile court must consider these factors in deciding whether to waive juvenile court jurisdiction. *S.N. v. State (In the Int. of S.N.)*, 139 Wis. 2d 270, 275, 407 N.W.2d 562 (Ct. App. 1987).

For purposes of waiver proceedings, the juvenile discovery statute does not provide access to police reports or the type of broad discovery permitted under the criminal discovery statutes. *T.M.J.*, 110 Wis. 2d at 11. *See chapter 9, supra*, for a discussion of the scope of discovery under [Wis. Stat.](#) §§ 48.293 and 938.293. Under [Wis. Stat.](#) § 938.293(1), counsel has a right to review, "prior to a plea hearing," copies of all police reports, including the officer's memorandum and witnesses' statements. Because the waiver hearing precedes a plea hearing, which will take place only if the court retains juvenile jurisdiction, the court of appeals has held that former [Wis. Stat.](#) § 48.293(1) (the predecessor to [Wis. Stat.](#) § 938.293(1)) did not apply to waiver hearings. *T.M.J.*, 110 Wis. 2d at 11. In addition, [Wis. Stat.](#) § 938.293(2), which refers to the criminal discovery statute, *see* [Wis. Stat.](#) § 971.23, specifically limits application of that statute to "all delinquency



proceedings.” Therefore, the court of appeals has held, because delinquency proceedings do not begin until the court decides to retain juvenile jurisdiction, the criminal discovery statutory provisions do not apply to waiver proceedings. *T.M.J.*, 110 Wis. 2d at 11.

In addition to the statutory rights to discovery, however, due process requires that a juvenile have a reasonable opportunity to demonstrate that the information presented to the court is “inaccurate, unreliable, or the product of bias or animosity on the part of other persons.” *D.H. v. State (In the Int. of D.H.)*, 76 Wis. 2d 286, 301, 251 N.W.2d 196 (1977). Furthermore, due process requires that the juvenile receive reasonable notice of records and reports that the court will consider in determining whether to waive juvenile court jurisdiction. *S.N.*, 139 Wis. 2d at 276.

Counsel should also seek discovery of information relevant to prosecutive merit, both at the preliminary stage and as a waiver criterion under [Wis. Stat. § 938.18\(5\)](#), which requires the court to consider the seriousness of the offense. In *T.M.J.*, the court of appeals analogized discovery relevant to prosecutive merit to that discovery constitutionally required at the preliminary hearing stage of an adult criminal proceeding. Discovery at the preliminary hearing stage applies only to information for which the defendant has shown a particularized need. *T.M.J.*, 110 Wis. 2d at 13 (citing *State ex rel. Lynch v. County Ct.*, 82 Wis. 2d 454, 466, 262 N.W.2d 773 (1978)). The court in *T.M.J.*, however, did not answer the question of what a showing of particularized need requires. Nor does *State ex rel. Lynch v. County Court*, on which *T.M.J.* is based, provide a working definition. In an unpublished decision, however, the court of appeals reversed an order waiving juvenile court jurisdiction, because the juvenile court had erroneously held the juvenile’s discovery motion not applicable at the waiver stage and, therefore, had not considered whether the juvenile had demonstrated a particularized need for limited discovery. *S.R. v. State (In the Int. of S.R.)*, No. 86-2073, 1987 WL 267556 (Wis. Ct. App. June 12, 1987) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

In another decision, the court of appeals upheld the juvenile court’s refusal to conduct an in camera inspection of all police reports to determine whether the state had complied with the discovery order to turn over all records and reports relating to the waiver criteria. That decision, however, rested on the juvenile’s failure to show or assert a violation of the discovery order, not on a per se rule barring this type of discovery at the waiver stage. *G.B.K. v. State (In the Int. of G.B.K.)*, 126 Wis. 2d 253, 261–63, 376 N.W.2d 385 (Ct. App. 1985). Note Judge Gartzke’s dissent, which would not have required a juvenile to make a showing or positive assertion of a prosecutorial violation of a discovery order before the juvenile court could conduct an in camera review. *Id.* at 263 (Gartzke, J., dissenting) (stating that “[c]ounsel for the juvenile can seldom know that such is the case”).

**Comment.** This limited right to discovery is ripe for challenge. Some states provide for a wider range of discovery before a waiver hearing. See, e.g., *In the Int. of N.H.*, [141 A.3d 1178](#), 1186 (N.J. 2016) (relying on New Jersey Supreme Court’s supervisory authority under that state’s constitution to conclude that state “should disclose all discovery in its possession soon after it seeks to waive jurisdiction in a juvenile matter”); *In re D.M.*, 2014-Ohio-3628, [18 N.E.3d 404](#) (holding that Ohio rule of juvenile procedure on discovery, generally applicable in juvenile court, applied in hearing to bind juvenile over to adult court).

#### 4. Type of Hearing Required [§ 14.11]

Waiver hearings must conform to statutory requirements. The juvenile must be represented by counsel at the waiver hearing. [Wis. Stat. § 938.18\(3\)\(a\)](#); see also [Wis. Stat. § 938.23\(1m\)](#) (providing that if a juvenile voluntarily and knowingly waives the right to counsel, the juvenile court cannot order the juvenile waived into adult court, transferred to the Department of Corrections for participation in the serious juvenile offender program, or committed to a juvenile correctional facility or secured residential care center for children and youth). For a discussion of the nature of the right to counsel, see [chapter 2](#) (rights of juveniles and parents), *supra*.

The juvenile also has the right to present evidence (including expert testimony) at the waiver hearing and has the right to cross-examine witnesses. [Wis. Stat. § 938.18\(3\)\(b\)](#). A juvenile does not, however, have a right to a jury trial at the waiver hearing. Rather, the court acts as the fact-finder. [Wis. Stat. § 938.18\(3\)\(c\)](#).

The Juvenile Justice Code expressly provides that the rules of evidence do not apply at waiver hearings. [Wis. Stat. § 938.299\(4\)\(b\)](#). The court must, however, give effect to the rules of privilege. *Id.* In addition, the Juvenile Justice Code requires that the court admit all evidence having reasonable probative value. *Id.* The court must “apply the basic principles of relevancy, materiality, and probative value” in deciding whether to admit evidence on questions of fact. *Id.* That is, the court must exclude any irrelevant evidence, [Wis. Stat. § 904.02](#), evidence that is more prejudicial than probative, [Wis. Stat. § 904.03](#), repetitious evidence, *id.*, and evidence otherwise inadmissible under [Wis. Stat. § 901.05](#). See [Wis. Stat. § 938.299\(4\)\(b\)](#). ([Wis. Stat. § 901.05](#) governs the admissibility of tests to detect the presence of HIV.) The court cannot admit hearsay evidence that does not have “demonstrable circumstantial guarantees of trustworthiness.” [Wis. Stat. § 938.299\(4\)\(b\)](#).

The waiver hearing consists of two parts, in which the juvenile judge must determine the following jurisdictional factors:

1. Whether the juvenile meets the age requirement for waiver and whether the state's allegation that the juvenile violated a state law has prosecutive merit, [Wis. Stat. § 938.18\(4\)\(a\)](#); and
2. Whether, based on the criteria of [Wis. Stat. § 938.18\(5\)](#), the court should waive juvenile jurisdiction, [Wis. Stat. § 938.18](#).

If the court determines that the matter does not have prosecutive merit, the court must deny the waiver petition. [Wis. Stat. § 938.18\(4\)\(a\)](#).

**Note.** The Wisconsin Court of Appeals has clarified the circumstances under which a court can permit waiver of a juvenile who has been charged with multiple offenses when only some offenses meet the statutory age requirement for waiver. In an unpublished opinion, the court of appeals held that when a juvenile is charged simultaneously in multiple petitions, waiver can be granted in some petitions, even though others must remain in juvenile court because the juvenile's age at the time of some of the alleged offenses fails to meet the statutory requirement. *State v. Jace H. (In the Int. of Jace H.)*, No. 2012AP2479, 2013 WL 5338057 (Wis. Ct. App. Sept. 25, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)). In *Jace H.*, the court of appeals reasoned that pursuant to [Wis. Stat. § 938.18\(4\)\(a\)](#), the age requirement is determined separately from the prosecutive-merit requirement. When the circuit court determined that one petition failed to meet the age requirement, the court was prevented from reaching the question of prosecutive merit in only that petition.

In a published opinion, the court of appeals reversed an order for waiver and remanded the matter to the juvenile court for further proceedings when one count of a multiple-count petition failed to meet the age requirement. The court did not hold that waiver was not appropriate for the charge in which the age requirement was met; instead, the court held that the waiver order for the petition was invalid as a whole. The court of appeals remanded the case for a determination whether waiver would be appropriate on the single count in which the juvenile did meet the age requirement. *State v. Phillips*, 2014 WI App 3, 352 Wis. 2d 493, 842 N.W.2d 504.

The state bears the burden of proving by clear and convincing evidence the allegations in the waiver petition. [Wis. Stat. § 938.18\(6\)](#).

For a discussion of the use of restraints and procedures for conducting hearings by telephone or live audiovisual means, see [chapter 8, supra](#).

## 5. Hearing When Juvenile Absconds [§ 14.12]

[Wis. Stat. § 938.18\(7\)](#) allows the court to proceed with the waiver hearing if the juvenile absconds and fails to appear at the waiver hearing. If the court grants the waiver petition, the juvenile can contest the waiver when apprehended, by showing the adult court good cause for the failure to appear. [Wis. Stat. § 938.18\(7\)](#). If the adult court finds good cause, then the court must transfer the case to the juvenile court for the purpose of holding the waiver hearing.

## III. Prosecutive Merit [§ 14.13]

### A. What Is Prosecutive Merit [§ 14.14]

The prosecutive-merit phase of a waiver proceeding is analogous to a preliminary hearing in an adult criminal case. *P.A.K. v. State (In the Int. of P.A.K.)*, 119 Wis. 2d 871, 875, 350 N.W.2d 677 (1984); *T.R.B. v. State (In the Int. of T.R.B.)*, 109 Wis. 2d 179, 187, 325 N.W.2d 329 (1982); *State v. Johnson*, 121 Wis. 2d 237, 250, 358 N.W.2d 824 (Ct. App. 1984). The state must prove to a reasonable probability that the violation alleged has been committed and that the juvenile probably committed it. *T.R.B.*, 109 Wis. 2d at 192. Therefore, the degree of probable cause required to support a finding of prosecutive merit in a waiver proceeding corresponds to that necessary for a bindover after a preliminary hearing in a criminal case. *Id.* at 188–90; see [Wis. Stat. § 970.03](#). In *T.R.B.*, the court rejected the state's argument that the degree of probable cause required to support a finding of prosecutive merit was similar to that required to support a criminal complaint. The court held that the legislative mandate—to keep children in the juvenile justice system, unless the state proves by clear and convincing evidence that it does not serve the child's and public's best interests for the juvenile court to hear the case—warrants the higher degree of probable cause. *T.R.B.*, 109 Wis. 2d at 191.

The manner in which the state establishes prosecutive merit in a waiver proceeding, however, differs from the manner in which the state establishes probable cause in an adult criminal preliminary hearing. The state does not have to follow the procedures used at preliminary hearings in adult criminal cases. *P.A.K.*, 119 Wis. 2d at 884–85. As noted above, although the rules of evidence apply to preliminary hearings, those rules do not apply in waiver hearings. Because the rules of evidence do not apply, the juvenile court can determine whether the case has prosecutive merit under [Wis. Stat. § 938.18\(4\)\(a\)](#) solely on the basis of the delinquency and waiver petitions, even if the juvenile contests prosecutive merit. *P.A.K.*, 119 Wis. 2d at 876–77. On the other hand, although waiver proceedings mirror preliminary

hearings, at which the court need not find probable cause as to each specific charge, the court of appeals in one unpublished decision rejected the state's argument that the court need not find prosecutive merit as to a specific charge, holding that the unique procedures for waiver hearings required such a finding. *C.E.T. v. State (In the Int. of C.E.T.)*, No. 87-1025-LV, 1987 WL 34936 (Wis. Ct. App. Nov. 24, 1987) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

The state is not foreclosed from presenting (or the court from considering) evidence other than the petitions at the prosecutive-merit stage. *P.A.K.*, 119 Wis. 2d at 886–87. The court can, in its discretion, take testimony or consider evidence other than the petition when necessary in a specific case. *Id.*

## B. Challenging Prosecutive Merit [§ 14.15]

Challenges to prosecutive merit may focus on any of the following: the specificity of the information in the petition, the guarantees of trustworthiness or reliability of witnesses, whether the information is based on personal observations of the police, and whether any witnesses have made statements against interest. See *P.A.K. v. State (In the Int. of P.A.K.)*, 119 Wis. 2d 871, 887–88, 350 N.W.2d 677 (1984).

When the state presents a petition as evidence of prosecutive merit, the juvenile can attack its reliability in the same way that defense counsel would attack the reliability of a criminal complaint. *T.M.J. v. State (In the Int. of T.M.J.)*, 110 Wis. 2d 7, 15, 327 N.W.2d 198 (Ct. App. 1982). The evidence presented by the state must have an “indicia of reliability or trustworthiness,” such as the petitioner’s personal observations. *J.G. v. State (In the Int. of J.G.)*, 119 Wis. 2d 748, 761, 350 N.W.2d 668 (1984). Even if the juvenile does not challenge reliability, the juvenile court must evaluate the reliability of the evidence in determining whether the case has prosecutive merit. *Id.* at 762. For example, in an unpublished decision, the court of appeals reversed a waiver order because the juvenile court did not specifically evaluate the reliability of a state’s witness who had misidentified another individual before identifying the accused juvenile. *S.R. v. State (In the Int. of S.R.)*, No. 86-2073, 1987 WL 267556 (Wis. Ct. App. June 12, 1987) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

A claim that the complainant intentionally misrepresented facts in the petition might require a hearing to determine the “truthfulness and materiality” of the statements. *T.M.J.*, 110 Wis. 2d at 16; see also *supra* § 7.24 (discussion of challenges to a petition based on material misstatement). Before the juvenile has a right to a hearing on the reliability of the petitioner, the juvenile must make a substantial preliminary showing that the petitioner “knowingly, intentionally or with reckless disregard, made a false statement.” *T.M.J.*, 110 Wis. 2d at 17.

*State v. Romero*, 2009 WI 32, 317 Wis. 2d 12, 765 N.W.2d 756, provides guidance on the standard for evaluating prosecutive merit. In that criminal case, the Wisconsin Supreme Court applied the *totality of the circumstances test* to examine whether there was probable cause for the issuance of a search warrant based on statements of an unnamed confidential informant. That informant supplied a police officer with cocaine that the informant had purchased from another unnamed individual (Mr. X). The informant claimed that Mr. X told him that the defendant sold him the cocaine. The officer who provided the affidavit could not affirm that either he or the informant had personal knowledge that the defendant furnished cocaine to Mr. X. The Wisconsin Supreme Court upheld the issuance of the search warrant. In weighing the totality of the circumstances, the court discussed reliability, veracity, credibility, and basis of information. The court held that “[t]he test is not whether the inference drawn [by the warrant-issuing commissioner] is the only reasonable inference. The test is whether the inference drawn is a reasonable one.” *Id.* ¶ 41 (quoting *State v. Ward*, 2000 WI 3, ¶ 30, 231 Wis. 2d 723, 604 N.W.2d 517). A concurring opinion cautioned that the test relies on a commonsense determination, weighing all available information. Under that analysis, an absence of facts to establish veracity of a declarant may be overcome by reliability of previously supplied information. Reliability is established by balancing the known facts. *Id.* ¶¶ 45–66 (Roggensack, J., concurring).

**Note.** The court in *Romero* noted that the U.S. Supreme Court adopted the “totality of the circumstances test” for determining probable cause in *Illinois v. Gates*, 462 U.S. 213, 238 (1983). *Romero*, 2009 WI 32, ¶ 17 & n.8, 317 Wis. 2d 12. In *Gates*, the U.S. Supreme Court rejected a two-pronged test that the Court had established in *Aguilar v. Texas*, 378 U.S. 108 (1964), which Wisconsin adopted in *T.M.J.*, 110 Wis. 2d at 16–17. Under that test, a juvenile could challenge the reliability of an informant who provided information contained in the petition, but only if the juvenile made a substantial preliminary showing that the petition failed to demonstrate both the informant’s credibility and the reliability of the manner in which the informant reached his or her conclusions. *T.M.J.*, 110 Wis. 2d at 16–17. In *T.M.J.*, the court had indicated that a citizen informant is presumed credible (i.e., presumed to meet the first part of the test). *Id.* at 17.

The juvenile’s own statement can provide evidence showing prosecutive merit. In *D.E.D. v. State (In the Interest of D.E.D.)*, 101 Wis. 2d 193, 201, 304 N.W.2d 133 (Ct. App. 1981), the court of appeals held that the juvenile court could not consider a confession obtained from a juvenile under circumstances indicating that the juvenile gave the statement involuntarily. The court characterized involuntary statements as inherently unreliable. In *J.G. v. State (In the Interest of J.G.)*, 119 Wis. 2d 748, 758, 350 N.W.2d 668 (1984), the supreme court overruled this characterization, holding that involuntariness does not equate with unreliability.

The decision in *J.G.* does not mean, however, that a juvenile cannot challenge the reliability of a confession as proof of prosecutive merit at the waiver stage. If the juvenile can make a preliminary showing of the untruthfulness of the confession and, therefore, its unreliability, the juvenile has a right to a hearing on the issue. *Id.* at 761–62. Nonetheless, merely asserting the involuntariness of the confession does not suffice to entitle the juvenile to a hearing on unreliability. *Id.* at 763. Moreover, even if the juvenile challenges the reliability of the confession, if the remaining content of the petition supports a finding of prosecutive merit, the court need not grant the juvenile’s request for a hearing on the reliability of the confession. *Id.*

**Note.** In *J.A.L. v. State (In the Interest of J.A.L.)*, 162 Wis. 2d 940, 471 N.W.2d 493 (1991), the Wisconsin Supreme Court was presented with the issue whether evidence obtained by monitoring a juvenile’s conversations with his family in the detention center was illegally obtained under [Wis. Stat.](#) §§ 968.27–968.31 and improperly admitted at the waiver hearing, thus invalidating the waiver. The court declined to decide the issue, instead holding as harmless any error that might have occurred. *Id.* at 971.

Once the juvenile court makes a finding of prosecutive merit, the court must decide whether to waive jurisdiction. The court must base the decision whether to waive on the criteria of [Wis. Stat.](#) § 938.18(5).

**Note.** After the court finds prosecutive merit, and the court advances to the second stage of the proceedings to waive juvenile court jurisdiction, a juvenile cannot then contest or contradict the findings that the offense charged was committed. *State v. X.S. (In the Int. of X.S.)*, 2022 WI 49, ¶¶ 27–28, 31, [402 Wis. 2d 481](#), 976 N.W.2d 425.

## IV. Decision to Waive Jurisdiction [§ 14.16]

### A. In General [§ 14.17]

[Wis. Stat.](#) § 938.18(4)(b) requires that if the court finds prosecutive merit and the waiver petition is contested, the district attorney must present relevant testimony on the issue of the appropriateness of waiver. The state has the burden of proving by clear and convincing evidence that waiver serves the best interests of the juvenile or the public. [Wis. Stat.](#) § 938.18(6).

If the juvenile does not contest the waiver petition, the court need not take any testimony if the court determines that the juvenile has knowingly, intelligently, and voluntarily decided not to contest the waiver petition. [Wis. Stat.](#) § 938.18(4)(c). Although the court need not take testimony, the court must still independently determine the appropriateness of waiver, based on the criteria specified in [Wis. Stat.](#) § 938.18(5). *Id.*

### B. Waiver Criteria of [Wis. Stat.](#) § 938.18(5) [§ 14.18]

#### 1. In General [§ 14.19]

[Wis. Stat.](#) § 938.18(5) lists numerous factors to guide the court in making its waiver decision. The list is not exhaustive and derives primarily from the criteria listed by the U.S. Supreme Court in *Kent v. United States*, 383 U.S. 541, 566 (1966). *J.V.R. v. State*, 127 Wis. 2d 192, 201, 378 N.W.2d 266 (1985). In *D.H. v. State (In the Interest of D.H.)*, 76 Wis. 2d 286, 308–09, 251 N.W.2d 196 (1977), the Wisconsin Supreme Court stressed the importance of the *Kent* criteria, including the likelihood of rehabilitation within the juvenile justice system. The criteria include the following:

1. The juvenile’s personality and prior record, [Wis. Stat.](#) § 938.18(5)(a), (am);
2. The type and seriousness of the offense, [Wis. Stat.](#) § 938.18(5)(b);
3. The adequacy and suitability of facilities for treatment of the juvenile and for protection of the public within the juvenile justice system, [Wis. Stat.](#) § 938.18(5)(c); and
4. The desirability of disposition of the offense in one court if co-actors will be charged in adult court, [Wis. Stat.](#) § 938.18(5)(d).

The court may direct an agency to submit a report that analyzes the waiver criteria in [Wis. Stat.](#) § 938.18(5). [Wis. Stat.](#) § 938.18(2m). An agency is defined as the Department of Children and Families, the Department of Corrections, a county department, or a licensed child welfare agency. [Wis. Stat.](#) § 938.38(1)(a).



The Wisconsin Supreme Court has discussed the preparation of waiver reports, comparing them with presentence investigations under [Wis. Stat. § 972.15](#). *State v. Tyler T. (In the Int. of Tyler T.)*, 2012 WI 52, 341 Wis. 2d 1, 814 N.W.2d 192. In preparing a presentence investigation, the Department of Corrections “must remain neutral and independent from both the prosecution and the defense.” *Id.* ¶ 38. Although the court noted its “reservations” about the decision of the agency that prepared the waiver investigation report to invite the district attorney but not the juvenile or the juvenile’s counsel to a “final staffing meeting” regarding the agency’s waiver recommendation, *id.* ¶ 42, the court nevertheless concluded “that the [agency] is free to compile information for a waiver investigation report in the matter it deems most beneficial to the circuit court,” *id.*

**Caution.** In *P.A.K. v. State (In the Interest of P.A.K.)*, 119 Wis. 2d 871, 882, 350 N.W.2d 677 (1984), the court opined that neither the juvenile nor parents may be forced to speak with intake workers and that the juvenile has the right to remain silent. *See infra* § [14.20](#); *see also* [Wis. Stat. § 938.24\(2\)\(b\)](#). Counsel may wish to weigh the benefits of participation in a court report interview with the juvenile. In any case, the juvenile should be warned not to discuss the underlying allegations with the interviewer.

The agency must file the report with the court, and the court must provide, at least three days before the hearing, copies of the report to the juvenile, the juvenile’s counsel, and the juvenile’s parent, guardian, or legal custodian. [Wis. Stat. § 938.18\(2m\)](#). In making its findings, the court may rely on facts contained in the report. *Id.*

## 2. Juvenile’s Personality [§ 14.20]

Factors relevant to the personality of the juvenile include the following:

1. Any mental illness or developmental disability of the juvenile;
2. The juvenile’s physical and mental maturity;
3. The juvenile’s pattern of living; and
4. The juvenile’s prior treatment history and apparent potential for responding to future treatment.

[Wis. Stat. § 938.18\(5\)\(a\)](#).

**Note.** In *J.A.L. v. State (In the Interest of J.A.L.)*, 162 Wis. 2d 940, 471 N.W.2d 493 (1991), the Wisconsin Supreme Court considered, but did not decide, which definition of mental illness applies in the waiver context: the definition applied to involuntary mental commitments under [Wis. Stat. ch. 51](#), or that pertaining to the “insanity defense.” [Wis. Stat. § 51.01\(13\)\(a\)](#) defines *mental illness* as “mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community.” [Wis. Stat. § 971.15\(1\)](#) provides that “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.” The court declined to decide which definition applies, holding that under the facts of the case, the child was not mentally ill under either definition.

A juvenile does not have an automatic right to a court-ordered psychiatric examination on the ground that the evaluation might turn up information relevant to mental illness or developmental disability. *S.N. v. State (In the Int. of S.N.)*, 139 Wis. 2d 270, 276–77, 407 N.W.2d 562 (Ct. App. 1987); *T.M.J. v. State (In the Int. of T.M.J.)*, 110 Wis. 2d 7, 20–21, 327 N.W.2d 198 (Ct. App. 1982). The juvenile must provide a basis for the evaluation, such as evidence that an evaluation would provide the court with information otherwise not available, *T.M.J.*, 110 Wis. 2d at 20, or that available information regarding the juvenile’s psychological state lacks reliability, *S.N.*, 139 Wis. 2d at 277.

**Practice Tip.** The juvenile or counsel might have private means to obtain a psychological evaluation as a supplement to a court-ordered evaluation, or counsel may consider asking the court for such an evaluation under [Wis. Stat. § 938.295](#). Courts often welcome testimony from respected experts in psychiatry, psychology, social work, or other fields of expertise.

When considering a psychological evaluation, attorneys must be cognizant of both the chance of a negative opinion and of a possible challenge to the doctor’s ability to provide expert testimony under the Daubert reliability standard. *See* [Wis. Stat. § 907.02](#); *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). For a good introduction to this issue, see Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, *Wis. Law*, Mar. 2011, at 14.

**Note.** In *P.A.K. v. State*, 119 Wis. 2d 871, 882, 350 N.W.2d 677 (1984), the supreme court noted that information about the juvenile’s personality (and motives and attitudes, *see infra* § [14.21](#)) can be obtained only by interviewing the juvenile and the juvenile’s parents. But because the intake worker cannot compel either the parent or the juvenile to provide information or to participate in interviews, the

state might not have any information about these factors, and the record might not contain any relevant evidence. *P.A.K.*, 119 Wis. 2d at 882; see also [Wis. Stat.](#) § 938.24(2)(b). In addition, under [Wis. Stat.](#) § 938.243(1)(c), the juvenile has the right to remain silent in a delinquency proceeding. See *supra* [ch. 2](#) (rights of juveniles and parents). The court in *P.A.K.* opined that a juvenile court cannot reasonably require the state to present evidence on each criterion when doing so would be impossible.

On the other hand, in an unpublished decision, the court of appeals found that evidence presented by the state regarding the juvenile's personality did not prove clearly and convincingly that waiving juvenile jurisdiction would serve the best interests of the juvenile and the public. *J.D.B. v. State (In the Int. of J.D.B.)*, No. 89-0658, 1989 WL 143062 (Wis. Ct. App. Sept. 26, 1989) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The record before the court showed that the juvenile cooperated, did not have a "street smart" mentality, was very naive about drugs (although charged with a drug offense), did not have an "adult living pattern," and needed treatment in an adolescent program. *Id.* at \*7. In addition, contrary to the requirements of *D.H. v. State (In the Interest of D.H.)*, 76 Wis. 2d 286, 251 N.W.2d 196 (1977), the juvenile court did not consider the juvenile's potential for rehabilitation. *J.D.B.*, 1989 WL 143062, at \*8. Finally, the state did not present any evidence countering testimony that the juvenile justice system had adequate facilities to treat the juvenile and that the public did not need protection from the juvenile. *Id.* In another unpublished decision, the court of appeals reversed a waiver order, based in part on the fact that the record did not contain any evidence supporting the court's conclusion that the treatment programs available in the juvenile system were "minimal." *D.A. v. State (In the Int. of D.A.)*, No. 90-2142, 1991 WL 44659 (Wis. Ct. App. Feb. 21, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). Rather, the record showed "overwhelming testimony" and an "absence of countervailing evidence" that the child could receive adequate treatment in the juvenile justice system. *Id.*

### 3. Prior Record [§ 14.21]

Factors relevant to the juvenile's prior record include the following:

1. Information about whether the court previously waived its jurisdiction over the juvenile, whether the juvenile has previously been convicted following a waiver, whether the juvenile has previously been found delinquent, and whether any prior delinquency or conviction involved the "infliction of serious bodily injury";
2. The juvenile's motives and attitudes; and
3. The juvenile's prior offenses.

[Wis. Stat.](#) § 938.18(5)(am).

In one unpublished decision, the court of appeals held that a child's prior juvenile referral (not resulting in adjudication) was "meaningless" because a referral constitutes merely an allegation and is therefore irrelevant. *M.R.R. v. State (In the Int. of M.R.R.)*, No. 87-1879, 1988 WL 78432 (Wis. Ct. App. May 12, 1988) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). In another unpublished opinion, however, the court of appeals held that it was harmless error to consider testimony regarding other charged offenses that were not subject to waiver. *State v. Jace H. (In the Int. of Jace H.)*, No. 2012AP2479, 2013 WL 5338057, ¶¶ 12–15 (Wis. Ct. App. Sept. 25, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

**Note.** As stated in section [14.20](#), *supra*, in *P.A.K. v. State*, 119 Wis. 2d 871, 882, 350 N.W.2d 677 (1984), the supreme court noted that information about the juvenile's motives and attitudes (and personality) can be obtained only by interviewing the juvenile and his or her parents.

But the state and the record might not have any information about these factors because the intake worker cannot compel the juvenile or parent to provide information or participate in interviews. *Id.*; see also [Wis. Stat.](#) §§ 938.24(2)(b), 938.243(1)(c) (right to remain silent in a delinquency proceeding).

In an unpublished decision, the court of appeals reversed a waiver order because waiver rested on the state's belief that the juvenile would not respond to treatment within the juvenile justice system because of his "motives and attitudes." *B.J.M. v. State (In the Int. of B.J.M.)*, No. 90-1370-LV, 1991 WL 29068 (Wis. Ct. App. Jan. 24, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). But the only evidence offered in support of this contention consisted of the social workers' "uncertain opinions," which did not suffice to prove by clear and convincing evidence the appropriateness of waiver. *Id.*

### 4. Type and Seriousness of Offense [§ 14.22]

Factors relevant to the type and seriousness of the offense include whether the juvenile allegedly committed an offense against property or against persons and the extent to which the juvenile allegedly committed the crime in a violent, aggressive, premeditated, or willful manner. [Wis. Stat.](#) § 938.18(5)(b).

The court of appeals sustained a waiver in an unpublished case in which the juvenile engaged in a drive-by shooting, resulting in a charge of first-degree reckless homicide, despite the fact that many of the factors the court considered—e.g., mental illness, immaturity, and low IQ—weighed in favor of not waiving the juvenile into adult court. *State v. Larry T.E. (In the Int. of Larry T.E.)*, No. 97-2523, 1998 WL 15216 (Wis. Ct. App. Jan. 20, 1998) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). But in another unpublished case, in which a juvenile and friends participated in a premeditated robbery, beating and kicking the victim, the court of appeals reversed the waiver decision, stating, in part: “[I]f one statutory factor is to outweigh all of the other relevant factors the court is bound to consider in a waiver decision, that factor must stand out clearly as more crucial to the best interests of the child or to the public than any of the others.” *State v. Matthew D. (In the Int. of Matthew D.)*, No. 97-3658, 1998 WL 105426, at \*4 (Wis. Ct. App. Mar. 12, 1998) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (also noting that “court must articulate its reasoning on the record”). Both cases were decided in 1998, but in different districts.

## 5. Adequacy and Suitability of Resources in Juvenile System [§ 14.23]

The court must determine whether the juvenile justice system and the mental-health system (when applicable) have facilities, services, and procedures for treating the juvenile and protecting the public. [Wis. Stat.](#) § 938.18(5)(c). One set of commentators has noted that the juvenile court should treat this criterion as the most important consideration in determining whether to waive jurisdiction. Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 9.16 (2d ed. 1983).

Wisconsin provided a new structure for juvenile correctional placements through the enactment of 2017 Wis. Act 185, *as amended* by 2019 Wis. Act 8. As of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, no facility for those anticipated placements had yet been built. *See* 2021 Wis. Act 252 (authorizing state to contract additional debt for the purpose of constructing new Type 1 juvenile correctional facility in Milwaukee County). Until the completed transition from the Copper Lake and Lincoln Hills Schools to new Type 1 juvenile correctional facilities and new secured residential care centers for children and youth, *see, e.g., supra* [ch. 5](#), counsel should consider the current state of the juvenile correctional system in Wisconsin when advocating against waiver.

**Note.** The supreme court has held that a juvenile court can order waiver of jurisdiction over a juvenile with a mental illness if the court can reasonably conclude that a mental commitment would not offer a suitable alternative for the juvenile and for protection of the public. *J.A.L. v. State (In the Int. of J.A.L.)*, 162 Wis. 2d 940, 968, 471 N.W.2d 493 (1991); *see also G.B.K. v. State (In the Int. of G.B.K.)*, 126 Wis. 2d 253, 257–59, 376 N.W.2d 385 (Ct. App. 1985).

In an unpublished decision, the court of appeals reversed the waiver order in a case in which the social worker testified that supervision in the juvenile system was appropriate, with conditions such as restitution, drug and alcohol evaluation, and referral to a supervised work program. *J.G.W. v. Department of Health & Soc. Servs. (In the Int. of J.G.W.)*, No. 82-677, 1983 WL 162108 (Wis. Ct. App. Jan. 7, 1983) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The court based its decision on the prosecution’s failure to submit any evidence of the child’s lack of amenability to treatment through available facilities in the juvenile system.

In another unpublished opinion, however, the court of appeals held that when determining the adequacy and suitability of juvenile services, the circuit court need not address every imaginable treatment option. “The circuit court need only explain that it has considered the ‘adequacy and suitability of facilities, services and procedures available,’ not any and all facilities, services or procedures.” *State v. Taylor M.S.*, No. 2013AP1337, 2013 WL 5450932, ¶ 7 (Wis. Ct. App. Oct. 2, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

The juvenile court cannot, as a basis for denying waiver of juvenile court jurisdiction, speculate about the type of sentence a juvenile would receive in the adult court. *State v. C.W. (In the Int. of C.W.)*, 142 Wis. 2d 763, 768, 419 N.W.2d 327 (Ct. App. 1987). On the other hand, in making its waiver determination, the juvenile court can consider evidence regarding available treatment programs within the adult correctional system. *J.A.L.*, 162 Wis. 2d at 975–76. In *J.A.L.*, the supreme court noted that although the juvenile court cannot deny waiver for fear that the adult court will not impose an appropriate sentence, the juvenile court need not “remain steadfastly ignorant of the resources, treatment and programs available in the adult system.” *Id.* at 976 (distinguishing *C.W.*, 142 Wis. 2d at 768). Comparison between resources in both systems “does not invite speculation about the probable adult sentence.” *Id.*

In considering the adequacy and suitability of resources in the juvenile justice system, the juvenile court can consider the age of the juvenile as a relevant factor. The juvenile’s age affects how much time the juvenile justice system will have to treat the juvenile. *State ex rel. T.D.D. v. Circuit Ct.*, 91 Wis. 2d 231, 241, 280 N.W.2d 264 (1979), *superseded by statute on other grounds, as stated in T.R.B. v. State (In the Int. of T.R.B.)*, 109 Wis. 2d 179, 325 N.W.2d 329 (1982) (noting that legislature amended former [Wis. Stat.](#) § 48.18, the predecessor to [Wis. Stat.](#) § 938.18, during 1979–80 session to mandate district attorney’s presentation of testimony at evidentiary hearing on waiver petition).



**Comment.** Chronological age is not listed among the statutory factors for the court to consider in making a waiver determination. Factors in [Wis. Stat.](#) § 938.18(5) such as physical and mental maturity; adequacy and suitability of facilities, services, and procedures available for treatment of the juvenile; and eligibility of the juvenile for placement in the serious juvenile offender program are more nuanced considerations that courts may balance to make a waiver decision.

In an unpublished opinion, *N.P.C. v. State (In the Interest of N.P.C.)*, No. 91-0775, 1991 WL 198194 (Wis. Ct. App. Aug. 8, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)), the court of appeals ordered the juvenile court to conduct a new waiver hearing because the court had relied on erroneous information in deciding to grant waiver. The waiver order was based on testimony that the child would be subject to juvenile court jurisdiction only until age 19. But the testimony was incorrect: the juvenile court could retain jurisdiction until age 25 because the petition charged the child with attempted first-degree intentional homicide. (Under the former Children’s Code, children adjudged delinquent for a violation of [Wis. Stat.](#) § 940.01 were subject to “extended jurisdiction.”)

## 6. Desirability of One Trial [§ 14.24]

If the juvenile committed an offense with co-actors, the juvenile court can consider the desirability of trial and disposition of the offense in one court. [Wis. Stat.](#) § 938.18(5)(d). A pair of commentators has noted that the juvenile court should treat this criterion as the least important of the waiver considerations because “[c]onsiderations of judicial administrative convenience ought not to favor waiver because of the presumption against transfer.” Melli & Hirsch, *supra* § 14.23, § 9.17, at 91. In an unpublished decision, the court of appeals has indicated that the goal of one trial does not have sufficient importance, by itself, to justify waiver of juvenile court jurisdiction. *K.A.S. v. State (In the Int. of K.A.S.)*, No. 86-2203, 1987 WL 267145 (Wis. Ct. App. Mar. 12, 1987) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

### C. Alternatives to Waiver [§ 14.25]

Defense counsel must do more than challenge evidence presented by the state in support of waiver. Counsel must also offer the court alternatives to waiver. *Geboy v. Gray*, 471 F.2d 575, 579 (7th Cir. 1973).

Defense counsel is in a unique position to advise the court of information about the juvenile’s background that might otherwise be unavailable. *Miller v. Quatsoe*, 332 F. Supp. 1269, 1275 (E.D. Wis. 1971). Defense counsel has the responsibility of developing a plan that, without waiver, serves the interests of the juvenile and the protection of the public. *Id.* The plan should show the availability of juvenile justice system resources not mentioned by the state. Melli & Hirsch, *supra* § 14.23, § 9.23. To do so might require the assistance of experts, such as a social worker, psychologist, or psychiatrist. *Id.* Counsel appointed by the Public Defender’s Office can apply to that office for funds to hire an expert.

### D. The Decision to Grant or Deny Waiver [§ 14.26]

The juvenile court has authority to order waiver if, after evaluation of the waiver criteria of [Wis. Stat.](#) § 938.18(5), clear and convincing evidence demonstrates that having the juvenile remain in the juvenile justice system would not serve the juvenile’s best interests or the interests of the public. [Wis. Stat.](#) § 938.18(6); *see also B.B. v. State (In the Int. of B.B.)*, 166 Wis. 2d 202, 210, 479 N.W.2d 205 (Ct. App. 1991). Interpreting the former waiver provisions in [Wis. Stat.](#) ch. 48, before the legislature’s creation of the Juvenile Justice Code, Wisconsin’s appellate courts had held that, although the best interests of the child were the paramount consideration, *J.A.L. v. State (In the Int. of J.A.L.)*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991), the juvenile court must also consider the interests of the public, *B.B.*, 166 Wis. 2d at 210. *Cf. G.L.Y. v. State (In the Int. of G.L.Y.)*, No. 89-2026, 1990 WL 57668 (Wis. Ct. App. Feb. 28, 1990) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (reversing waiver order, in part because juvenile court failed to give child’s best interest paramount importance). The current Juvenile Justice Code, however, no longer “direct[s] the juvenile court to give the child’s best interests prevailing consideration over the public’s best interests.” *State v. Patrick L.M. (In the Int. of Patrick L.M.)*, No. 03-0303, 2003 WL 21152557, ¶ 13 (Wis. Ct. App. May 20, 2003) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).

The court has discretion to decide how much weight to accord each of the criteria listed under [Wis. Stat.](#) § 938.18(5). *J.A.L.*, 162 Wis. 2d at 960; *see also State v. F.R.W. (In the Int. of F.R.W.)*, 61 Wis. 2d 193, 205, 212 N.W.2d 130 (1973). For example, the court of appeals has held that it is not an erroneous exercise of discretion when the juvenile court waives jurisdiction after giving heavy weight to the seriousness of the offense, as in a homicide case. *B.B.*, 166 Wis. 2d at 210; *G.B.K. v. State (In the Int. of G.B.K.)*, 126 Wis. 2d 253, 260, 376 N.W.2d 385 (Ct. App. 1985).

After considering the [Wis. Stat.](#) § 938.18(5) criteria, the court must, under [Wis. Stat.](#) § 938.18(6), “state its finding with respect to the criteria on the record.” The court of appeals rejected the notion that the juvenile court judge must resolve all statutory criteria against the

juvenile before the court can order waiver, nor must the state present evidence on all the waiver criteria listed. *G.B.K.*, 126 Wis. 2d at 256. The court must, however, consider and make findings regarding each criterion for which the record contains evidence. *See id.*; [Wis. Stat. § 938.18\(6\)](#); *see also State v. C.W. (In the Int. of C.W.)*, 142 Wis. 2d 763, 769, 419 N.W.2d 327 (Ct. App. 1987).

In *C.W.*, 142 Wis. 2d at 769, the court of appeals reversed the waiver order because the juvenile court had failed to consider all the criteria listed in the former [Wis. Stat. § 48.18\(5\)](#) (the precursor to [Wis. Stat. § 938.18\(5\)](#)), and the record contained evidence regarding all the criteria. The court distinguished *P.A.K. v. State*, 119 Wis. 2d 871, 350 N.W.2d 677 (1984), noting that *P.A.K.*'s holding that the juvenile court need not receive evidence and make findings about all the statutory criteria was limited to cases in which the state would have found it "legally impossible" to present evidence on all the waiver criteria. *C.W.*, 142 Wis. 2d at 769 & n.10 (citing *P.A.K.*, 119 Wis. 2d at 881–82).

These principles hold practical significance for defense counsel. If the record contains evidence regarding a particular criterion, the judge must consider that evidence. In two unpublished decisions, the court of appeals reversed waiver orders based on the juvenile court's failure to make findings regarding criteria for which evidence was submitted at the waiver hearing. The court remanded the cases to the juvenile court for new waiver hearings. *Emmanuel L.B. v. State (In the Int. of Emmanuel L.B.)*, No. 93-0002, 1993 WL 98765 (Wis. Ct. App. Apr. 6, 1993) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)); *J.C. v. State (In the Int. of J.C.)*, No. 91-0426, 1991 WL 180020 (Wis. Ct. App. July 23, 1991) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)). If the only evidence regarding a particular factor militates against waiver, then the state has failed to show by clear and convincing evidence (at least as to that factor) that waiver serves the best interests of the juvenile and the public.

**Note.** More recent unpublished opinions from the court of appeals have been less inclined to reverse circuit court decisions. In an opinion in 2015, the court of appeals stated that "in reviewing the juvenile court's discretionary determination on waiver, this court looks for reasons to uphold the court's decision." *State v. Juwon B. (In the Int. of Juwon B.)*, No. 2014AP2504, 2015 WL 541014, ¶ 6 (Wis. Ct. App. Feb. 11, 2015) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)). For an example of the court stretching the circuit court's decision to find that criteria were considered, *see State v. Kadeem R. (In the Interest of Kadeem R.)*, No. 2013AP2769, 2014 WL 1303086 (Wis. Ct. App. Apr. 2, 2014) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)).

**Comment.** How defense counsel challenges the waiver criteria in an individual case depends on the facts of the case, but case law in both published and unpublished decisions reversing waiver decisions nevertheless provides instructive guidance in demonstrating the types of challenges defense counsel have successfully brought.

## E. If Court Grants Waiver [§ 14.27]

If the court orders waiver for a juvenile held in secure custody, the juvenile must be transferred to the appropriate adult facility and will be eligible for bail. [Wis. Stat. § 938.18\(8\)](#). [Wis. Stat. ch. 969](#) governs bail.

Once the juvenile court waives a juvenile into adult court, the prosecutor can charge the individual in adult court with offenses in addition to those alleged in the delinquency petition in juvenile court. [Wis. Stat. § 938.18\(9\)](#). The same rules governing subject-matter jurisdiction as to counts alleged in an information after a bindover in a criminal case apply to charging in adult court after waiver of a juvenile into that court. *State v. Johnson*, 121 Wis. 2d 237, 251, 358 N.W.2d 824 (Ct. App. 1984). Thus, as long as the offenses charged in adult court are not "wholly unrelated" to the facts considered or testified to at the waiver hearing, the adult court has subject-matter jurisdiction to try the defendant on those charges. *Id.* at 251–52. Although the term "jurisdiction" is commonly used to distinguish between juvenile-court authority and adult-court authority, the court of appeals held in *State v. Schroeder*, 224 Wis. 2d 706, 717–19, 593 N.W.2d 76 (Ct. App. 1999), that this term is not correctly used in this context. Instead, the issue is one of the court's statutory authority or competence.

**Comment.** In *State v. Karow*, 154 Wis. 2d 375, 453 N.W.2d 181 (Ct. App. 1990), the court of appeals held that once the juvenile court waives its jurisdiction over a juvenile, the prosecutor has the authority to charge the juvenile with lesser-included or related crimes in adult court. Although the court in *Karow* focused only on whether the prosecutor could charge the juvenile with two related offenses in addition to first-degree intentional homicide (the charge that provided the basis for the waiver), the holding appears to have a broader reach. Further, this issue can be waived by a guilty plea; a juvenile can waive any challenge to the court's competence by entering a guilty plea in adult court. *See, e.g., Schroeder*, 224 Wis. 2d 706.

After a juvenile court orders waiver and before the state charges the juvenile in adult court, defense counsel should discuss with the client whether to appeal the waiver decision. *See chapter 13, supra*, for a discussion of appeals of waiver orders. After a criminal complaint has been filed in adult court, the juvenile court loses jurisdiction and the criminal court has exclusive jurisdiction. *State v. Vairin M. (In the Int. of Vairin M.)*, 2002 WI 96, 255 Wis. 2d 137, 647 N.W.2d 208. In *Vairin M.*, the supreme court held that a juvenile court has jurisdiction to reconsider its waiver order or to stay its waiver order pending appeal only until the filing of a complaint in criminal court. After the

criminal court has assumed jurisdiction, a juvenile seeking prompt review of a waiver order may bring an interlocutory appeal under [Wis. Stat. § 809.50](#) and move the court of appeals or the criminal court to stay the criminal proceedings pending appeal or file a motion with the criminal court asking the court to relinquish its jurisdiction by transferring the matter to juvenile court. If the motion is granted, then the juvenile may file a motion for reconsideration with the juvenile court. *Id.* ¶¶ 6–8.

## V. Stipulating to Waiver [§ 14.28]

Counsel should advise the juvenile of the relative disadvantages and advantages of filing a waiver petition and of agreeing to waiver. In some instances, the juvenile may prefer waiver of jurisdiction to take advantage of the opportunity for a jury trial.

If a juvenile wants to stipulate to waiver with the hope of receiving a sentence less onerous in adult court than commitment to a juvenile correctional facility, for example, defense counsel must advise the juvenile of the disadvantages of agreeing to waiver. Waiver can expose the juvenile to severe punishment and possible commitment for a longer period than that faced in the juvenile system, to criminal proceedings that are public, to a criminal record, and to the potential loss of rights upon conviction. *T.R.B. v. State (In the Int. of T.R.B.)*, 109 Wis. 2d 179, 198, 325 N.W.2d 329 (1982).

In addition, under [Wis. Stat. § 938.183\(1\)\(b\)](#), waiver of jurisdiction by a court exercising juvenile jurisdiction provides for original adult court jurisdiction for subsequent criminal proceedings.

Counsel must also advise the juvenile that the court retains the power to decide whether the juvenile will be waived. If a juvenile does not contest waiver of jurisdiction, an evidentiary hearing is not required. See [Wis. Stat. § 938.18\(4\)\(b\)](#) (stating that district attorney must present testimony “[i]f a petition for waiver of jurisdiction is contested”); *State v. Gaustad*, No. 2007AP1429, 2008 WL 382998 (Wis. Ct. App. Feb. 14, 2008) (unpublished opinion not citable per [Wis. Stat. § 809.23\(3\)](#)).

The court must inquire into the capacity of the juvenile to make a knowing, intelligent, and voluntary decision not to contest the waiver petition. [Wis. Stat. § 938.18\(4\)\(c\)](#). If the court concludes that the juvenile has knowingly, intelligently, and voluntarily made the decision not to contest the waiver petition, the court must still independently determine the appropriateness of waiver. *Id.* The court need not take any testimony if the court determines that the decision not to contest the waiver petition is knowingly, intelligently, and voluntarily made.

## VI. Practice Form [§ 14.29]

The form in this section is offered as a practice guide. Always check original sources of authority for current law. When using the sample form, also check local practice and adapt the form language to fit the client’s circumstances. Note that many standard juvenile court forms, such as petitions, orders, and waivers, have been prepared by the Wisconsin Records Management Committee and are available from the clerk of court in each county or through the Wisconsin Court System’s website, at <https://www.wicourts.gov/forms1/circuit.htm>. A list of those standard court forms is included in [appendix B](#) of this book, *infra*.

### A. Motion to Dismiss Defective Waiver Petition (Form CRM-0213) [§ 14.30]

STATE OF WISCONSIN : CIRCUIT COURT : \_\_\_\_\_ COUNTY  
BRANCH \_\_\_\_\_

In the Interest of

\_\_\_\_\_ A Person Under the Age of 17

Case No. \_\_\_\_\_

#### MOTION TO DISMISS DEFECTIVE WAIVER PETITION

1. (*Juvenile's name*), by (*his*) (*her*) attorney, moves the court for an order dismissing the above-captioned proceeding.
2. The grounds for this motion are as follows.

a. The petition filed in this case fails to set forth “a brief statement of the facts supporting the request for waiver,” as required by [Wis. Stat. § 938.18\(2\)](#). In *J.V.R. v. State*, 127 Wis. 2d 192, 201–02, 378 N.W.2d 266 (1985), the supreme court, discussing the requirements of [Wis. Stat. § 48.18\(2\)](#) [now [Wis. Stat. § 938.18\(2\)](#)], held as follows:

[Wis. Stat. § 48.18\(2\)](#) [now [Wis. Stat. § 938.18\(2\)](#)], operates to provide the juvenile with notice of the facts upon which the state will rely in seeking waiver so that the juvenile can focus his defense on the relevant factors from [Wis. Stat. § 48.18\(5\)](#) [now [Wis. Stat. § 938.18\(5\)](#)]. A waiver petition which merely refers to the factors contained in [Wis. Stat. § 48.18\(5\)](#) [now [Wis. Stat. § 938.18\(5\)](#)] will not suffice. The waiver petition must briefly state the facts the state will offer at the hearing.

b. Because the petition in this case does not contain a sufficient statement of facts supporting the request for waiver, (*juvenile's name*) is denied proper notice and due process of law in violation of Wis. Const. art. 1, §§ 7, 8, and 11, and the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution.

This motion is made subject to objection to the jurisdiction of the court.

Dated \_\_\_\_\_

(Firm/Office name)  
Attorneys for (*juvenile's name*)

[Type “Electronically signed by”  
and your name on this line]  
\_\_\_\_\_  
(Attorney's name)

(Attorney's address)  
(Attorney's email address)  
(Attorney's telephone number)  
State Bar No. \_\_\_\_\_

## VII. Standard Juvenile Court Forms [§ 14.31]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

### Juvenile Court Forms—[Wis. Stat. Chs. 48 and 938](#) Wisconsin Records Management Committee

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form                              | Purpose  |
|-------------------------|---------------------------|---|--|
| <a href="#">JD-1722</a> | Ch. 938                   | Petition for waiver of jurisdiction       | Petition requesting the court to waive the juvenile into adult criminal court                    |
| <a href="#">JD-1723</a> | Ch. 938                   | Order waiving juvenile court jurisdiction | Formal decision on the request to waive a juvenile from juvenile court into adult criminal court |

## Supplement Chapter 15

# Confidentiality

Book sections supplemented: [15.1](#), [15.10](#), [15.20](#), [15.43](#), and [15.46](#)

## 15.1 Scope of Chapter

[Page 2: Updated currency information in footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272, and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024).

## 15.10 [Records] In General

[Pages 5–6: Amended sixth textual sentence and last string citation in first paragraph after Note in section](#)

[Wis. Stat.](#) §§ 48.396, 48.78, 938.396, and 938.78 are the general statutory sections governing confidentiality of records under the Children’s Code and the Juvenile Justice Code. Many provisions relating to the release of confidential information (other than court records) under the Children’s Code and the Juvenile Justice Code require an agency, not the court, to determine whether the entity or person requesting disclosure meets the statutory standards for disclosure. There is no judicial review of the decision to release confidential information. But individuals denied access to law enforcement records may obtain court review of this decision. [Wis. Stat.](#) §§ 48.396(5), 938.396(1j). When an individual seeks court review of a denial of a request for the release of a law enforcement record, the court must, in CHIPS and unborn children in need of protection or services (UCHIPS) cases, balance the interest of the person seeking the record against the interest of the child or expectant mother in avoiding the stigma that might result from disclosure. [Wis. Stat.](#) § 48.396(5)(c). In delinquency and JIPS cases, the court must balance the person’s interest in recovering for any injury, damage, or loss the person has suffered against the juvenile’s interest in rehabilitation and in avoiding stigma; the court must also balance the public’s interest in the redress of private wrongs through private litigation against the public’s interest in protecting the integrity of the juvenile justice system. *See* [Wis. Stat.](#) § 938.396(1j)(c)1., 2.; *cf.* [Wis. Stat.](#) § 938.396(1j)(c)3. (requiring balancing of petitioner’s legitimate educational interests, including safety interests, in information against society’s interest in protecting its confidentiality, when law enforcement agency denied school access to juvenile records under [Wis. Stat.](#) § 938.396(1)(c)3.). Some circuit courts have adopted local rules requiring judicial determination of whether to release records, so as to avoid potential problems that might arise when clerks of court or law enforcement agencies are compelled to make this determination. *See generally*, e.g., Dane Cnty. Juv. Ct. R. 601 (last updated May 1, 1999) (adopting “the Dane County Juvenile Court Policies and Procedures Manual with the full force of circuit court rules”); Dane Cnty. Juv. Ct. Program, *Policy and Procedure Manual* § III, <https://juvenilecourt.danecounty.gov/Resources/Policy-and-Procedure-Manual> (last visited Oct. 26, 2024) (access to records and confidentiality).

## 15.20 [Records] [Agency Records] In General

[Page 9: Added paragraph after first paragraph in section](#)

In 2023, the Wisconsin Supreme Court distinguished *Pennsylvania v. Ritchie* and overruled in part *Rock County Department of Social Services v. DeLeu*. *State v. Johnson*, [2023 WI 39](#), [407 Wis. 2d 195](#), [990 N.W.2d 174](#). First, the supreme court noted that nothing in its decision in *Johnson* affected the in camera review procedure for confidential health records already in the state’s possession. Second, the *Johnson* court overruled *State v. Shiffra*, [175 Wis. 2d 600](#), [499 N.W.2d 719](#) (Ct. App. 1993), and related cases such as *DeLeu*, for three reasons: (1) *Shiffra* had incorrectly concluded that *Ritchie* applied to privileged records that were not in the state’s possession, and that conclusion had undermined the therapist-patient relationship; (2) the standards used in *Shiffra* and related cases were not viable in practice; and (3) *Shiffra* frustrated the ability to prosecute sexual-assault crimes, it reinforced old trends of doubting victims, and it was in tension with a later expansion of victims’ rights in the Wisconsin Statutes and the Wisconsin Constitution. *Johnson*, [2023 WI 39](#), ¶ 23, [407 Wis. 2d 195](#).

[Page 10: Read in conjunction with Note after paragraph 7. in numbered list](#)



The Wisconsin Legislature recently expanded the list of substitute care providers who are entitled to access to specified information about a child. As amended, the list will include “like-kin.” [Wis. Stat.](#) §§ 48.371(1), 938.371(1), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

### 15.43 [Records] [Court Records] Access by Foster Parents and Other Physical Custodians

[Page 17: Read in conjunction with first paragraph in section](#)

The Wisconsin Legislature recently expanded the list of physical custodians who must receive a copy of a child’s permanency plan. As amended, the list will include “like-kin.” [Wis. Stat.](#) §§ 48.371(3), 938.371(3), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

### 15.46 [Records] Medical Records: Test Results Under [Wis. Stat. § 938.296](#)

[Pages 18–19: Read in conjunction with first paragraph in section](#)

The Wisconsin Legislature recently expanded the list of substitute care providers who are entitled to access to a child’s HIV test results. As amended, the list will include “like-kin.” [Wis. Stat.](#) §§ 48.371(1), 938.371(1), *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice).

## Chapter 15

## Confidentiality

### I. [Scope of Chapter](#)

#### [§ 15.1]

Before July 1996, the Children’s Code generally excluded the public from juvenile court hearings unless the child demanded a public fact-finding hearing. Victims could attend fact-finding and dispositional hearings, although the judge might exclude them from portions of any hearing dealing with sensitive matters personal to the child or the child’s family and not directly related to the acts at issue. In addition, all juvenile records were presumed to be confidential. The best interests of the child and the administration of justice, in both children in need of protection or services (CHIPS) and delinquency proceedings, required that the confidentiality of juvenile court records be protected. [State ex rel. Herget v. Waukesha Cnty. Circuit Ct.](#), 84 Wis. 2d 435, 267 N.W.2d 309 (1978).<sup>1</sup>

Since 1996, a greater degree of confidentiality attaches to proceedings under [Wis. Stat.](#) ch. 48, the revised Children’s Code, than to proceedings under [Wis. Stat.](#) ch. 938, the Juvenile Justice Code. Although the general rule of confidentiality remains the same, there are so many statutory exceptions under the Juvenile Justice Code that confidentiality has been seriously eroded in delinquency and juveniles in need of protection or services (JIPS) cases.

This chapter discusses the statutory provisions governing confidentiality of proceedings and records under the Children’s Code and the Juvenile Justice Code, as well as relevant case law interpreting those provisions. The records that must be released to a child, parent, or expectant mother as discovery under [Wis. Stat.](#) §§ 48.293 and 938.293 are discussed in [chapter 9](#), *supra*.

### II. Hearings [§ 15.2]

#### A. Exclusion of CHIPS Child [§ 15.3]

The court may temporarily exclude the child from a CHIPS hearing, upon a finding that it is in the best interest of the child, and with the consent of the child’s attorney or guardian ad litem. [Wis. Stat.](#) § 48.299(3). A child under age seven may be excluded from the entire hearing if the court finds that the child is too young to comprehend the hearing and that exclusion is in the child’s best interest. *Id.*

## B. Exclusion of the Public [§ 15.4]

Generally, the public is excluded from hearings under [Wis. Stat.](#) ch. 48 and [Wis. Stat.](#) ch. 938 unless the child or the expectant mother, through counsel, or the unborn child's guardian ad litem, demands a public hearing. [Wis. Stat.](#) §§ 48.299(1)(a), 938.299(1)(a).

In [Wis. Stat.](#) ch. 48 proceedings in which the child, expectant mother, or unborn child's guardian ad litem has demanded a public hearing, the court must refuse to grant a public hearing if the parent, guardian, expectant mother, or unborn child's guardian ad litem objects. [Wis. Stat.](#) § 48.299(1)(a). [Wis. Stat.](#) § 48.299(1) provides an exception in proceedings in which the child is seeking judicial waiver of parental consent for an abortion under [Wis. Stat.](#) § 48.375. [Wis. Stat.](#) § 48.299(1)(ar) ("All hearings under [[Wis. Stat.](#) §] 48.375(7) shall be held in chambers, unless a public fact-finding hearing is demanded by the child through her counsel."). *See generally infra* [ch. 18](#).

In [Wis. Stat.](#) ch. 938 proceedings in which the juvenile has demanded a public hearing, the court must refuse to grant a public hearing if, in a delinquency or JIPS case charging sexual assault, the victim objects. [Wis. Stat.](#) § 938.299(1)(a). The court must also refuse to grant a public hearing if, in a nondelinquency JIPS case, the parent or guardian objects. *Id.*

Certain exceptions exist to this public-exclusion rule in [Wis. Stat.](#) ch. 938 proceedings. For instance, the court may admit a person engaged in the bona fide research, monitoring, or evaluation of activities conducted under 42 [U.S.C.](#) § 629h, as determined by the director of state courts. [Wis. Stat.](#) § 938.299(1)(a). (42 [U.S.C.](#) § 629h provides entitlement funding information for the state courts to access and improve handling of proceedings related to foster care and adoption.) Under another exception, the public may attend any hearing (1) for a juvenile who has been alleged delinquent for committing a violation that would be a felony if committed by an adult if that juvenile has previously been adjudicated delinquent and that prior adjudication remains of record and unreversed, or (2) for a juvenile who has been alleged to be delinquent for committing a serious juvenile offender violation as defined in [Wis. Stat.](#) § 938.34(4h)(a). [Wis. Stat.](#) § 938.299(1)(ar)1. Even under the [Wis. Stat.](#) § 938.299(1)(ar)1. exceptions, however, the public must be excluded if the victim of a sexual assault objects. [Wis. Stat.](#) § 938.299(1)(ar)2. Under [Wis. Stat.](#) ch. 938, the court also has discretion to exclude the public from any hearing, including those portions of hearings dealing with sensitive matters personal to the juvenile or juvenile's family and not related to the act or alleged act of the juvenile. *Id.*

## C. Rights of Victims Under [Wis. Stat.](#) Ch. 938 [§ 15.5]

In delinquency and JIPS cases, victims of a juvenile's alleged act may attend hearings, if they are not witnesses subject to a sequestration order under [Wis. Stat.](#) § 906.15. [Wis. Stat.](#) § 938.299(1)(am). Victims may be excluded from any portion of a hearing dealing with sensitive personal matters of the juvenile or the juvenile's family and not directly related to the act or alleged act against the victim. *Id.* A member of the victim's family may also be present, as well as (at the victim's request) a representative of an organization providing support to the victim. *Id.*

**Note.** In *Shawn B.N. v. State (In the Interest of Shawn B.N.)*, 173 Wis. 2d 343, 362, 497 N.W.2d 141 (Ct. App. 1992), the court of appeals found that the juvenile court erred in permitting the victim's family to attend the dispositional hearing. The holding, however, was based on an interpretation of former [Wis. Stat.](#) § 48.299(1)(am) (1991–92), which permitted the victim to attend only fact-finding hearings.

The victim must receive timely notice of the time and place of any hearing that the victim may attend. [Wis. Stat.](#) § 938.346(1)(f). [Wis. Stat.](#) § 938.346(1) also gives the victim the right to receive timely notice of certain information, including the procedures for obtaining the identity of the juvenile and the juvenile's parents, the procedure for obtaining the juvenile's police records, information related to disposition, and information about the victim's right to make a victim-impact statement. [Wis. Stat.](#) § 938.335(3m) governs victim-impact statements in juvenile court proceedings. *See supra* [ch. 11](#) (discussion of victim-impact statements).

In 2020, a constitutional amendment known colloquially as "Marsy's Law" was approved in Wisconsin. *See* Wis. Const. art. I, § 9m. This amendment expanded victims' rights and the circumstances in which those rights apply. *See* Off. of Crime Victim Servs., Wis. Dep't of Just., *Victims of Crime Constitutional Amendment Rights* (last updated May 6, 2020), <https://www.doj.state.wi.us/ocvs> (click on "List of Wisconsin's Constitutional Rights for Crime Victims"). Additionally, Marsy's Law expanded the definition of "victim" to include a list of individuals other than the person against whom the crime was committed. Wis. Const. art. I, § 9m(1).

## D. News Media [§ 15.6]

Representatives of the news media may attend [Wis. Stat.](#) ch. 938 hearings for the purpose of reporting news without revealing the identity of the juvenile or the family of the juvenile involved. [Wis. Stat.](#) § 938.299(1)(a); *State ex rel. E.R. v. Flynn*, 88 Wis. 2d 37, 276



[N.W.2d 313 \(Ct. App. 1979\).](#)

## E. Foster Parents and Other Physical Custodians [§ 15.7]

Foster parents or other physical custodians may attend hearings under [Wis. Stat.](#) chs. 48 and 938. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(ag). [Wis. Stat.](#) §§ 48.02(6) and 938.02(6) define *foster home*. [Wis. Stat.](#) § 48.62(2) describes those physical custodians with the right to be present at hearings under [Wis. Stat.](#) §§ 48.299 and 938.299. The court may exclude these persons, however, from hearings dealing with sensitive personal matters concerning the child or the child's family or if the court determines that it would be in the best interests of the child for the foster parent or other physical custodian to be excluded from the hearing. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(ag).

## F. Other Persons Approved by the Court [§ 15.8]

The parties, their counsel or guardian ad litem, the court-appointed special advocate, witnesses, and “other persons requested by a party and approved by the court” may be present at hearings from which the public is excluded. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(a). The court may also admit any person whom the court finds to have a “proper interest” in the case or in the work of the court, including members of the bar or a person engaged in the bona fide research, monitoring, or evaluation of activities conducted under 42 [U.S.C.](#) § 629h, as determined by the director of state courts. [Wis. Stat.](#) §§ 48.299(1)(ag), 938.299(1)(a).

## III. Records [§ 15.9]

### A. In General [§ 15.10]

The supreme court has held that provisions of the former Children's Code mandating confidentiality of juvenile records expressed the legislature's intent that the best interests of the child and the administration of the juvenile justice system required protecting the confidentiality of juvenile court records. *State ex rel. Herget v. Waukesha Cnty. Circuit Ct.*, 84 Wis. 2d 435, 267 N.W.2d 309 (1978). Under the Juvenile Justice Code, however, the legislature has created many exceptions to the general rule of confidentiality.

The juvenile court plays a gatekeeper role when determining whether to release juvenile records. *Courtney F. v. Ramiro M.C. (In re Termination of Parental Rts. to Caleb J.F.)*, 2004 WI App 36, ¶ 19, 269 Wis. 2d 709, 676 N.W.2d 545. “[T]he juvenile court must make a threshold relevancy determination by an in camera review when confronted with: (1) a discovery request under [Wis. Stat.](#) § 48.293(2); (2) an inspection request of juvenile records under [Wis. Stat.](#) §§ 48.396(2)(a) and 938.396(2)(a); or (3) an inspection request of agency records under [Wis. Stat.](#) §§ 48.78(2)(a) and 938.78(2)(a).” *Id.* ¶ 21. Once such a request is made, the juvenile court must give notice of such a request to the juvenile and give the juvenile an opportunity to be heard. *Id.* ¶ 39.

In *Herget*, 84 Wis. 2d 435, the Wisconsin Supreme Court articulated the standard to be used by circuit courts in determining whether to release juvenile court records. A court may release juvenile court records only after it has reviewed the records in camera and has determined that the need for confidentiality is outweighed by the exigencies of the circumstances. *Id.* at 451–52. Factors relevant to this determination are the need for the requested information, the relevance of the information to the cause of action, the probable admissibility of the information at trial, the efforts made to obtain the information from other sources, and the hardship should the court fail to release the records. *Id.* at 452.

Under *Herget*, if the court determines that the records should be released, it must tailor its order to permit disclosure of necessary information only and must make a record in support of its ruling. *Id.* See [Wis. Stat.](#) §§ 48.396(5) and 938.396(1j), which explicitly incorporate the *Herget* standards into the provisions for release of law enforcement records.

**Note.** The court of appeals held that a criminal defendant was not entitled to mandatory release of juvenile court records of delinquency proceedings of two juveniles, involving the same victim from his case, despite the defendant's assertions that there might have been exculpatory evidence in the records. *State v. A.S.W. (In the Int. of A.S.W.)*, Nos. 2015AP2119, 2015AP2120, 2016 WL 5794340 (Wis. Ct. App Oct. 5, 2016) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)). The court reasoned, in part, that there were not records “relating to” the requesting criminal defendant in the juveniles' files, within the meaning of [Wis. Stat.](#) § 938.396(2g) (dm). *Id.* ¶¶ 10–13; see also *infra* § 15.39. The court of appeals further explained that its holding affirmed the “main aim” of [Wis. Stat.](#) § 938.396(2) in protecting the confidentiality of juvenile court records. *A.S.W.*, 2016 WL 5794340, ¶ 12. The court of appeals also concluded that the circuit court properly denied the defendant an in camera review of the records. *Id.* ¶¶ 14–21.

[Wis. Stat.](#) §§ 48.396, 48.78, 938.396, and 938.78 are the general statutory sections governing confidentiality of records under the Children’s Code and the Juvenile Justice Code. Many provisions relating to the release of confidential information (other than court records) under the Children’s Code and the Juvenile Justice Code require an agency, not the court, to determine whether the entity or person requesting disclosure meets the statutory standards for disclosure. There is no judicial review of the decision to release confidential information. But individuals denied access to law enforcement records may obtain court review of this decision. [Wis. Stat.](#) §§ 48.396(5), 938.396(1j). When an individual seeks court review of a denial of a request for the release of a law enforcement record, the court must, in CHIPS and unborn children in need of protection or services (UCHIPS) cases, balance the interest of the person seeking the record against the interest of the child or expectant mother in avoiding the stigma that might result from disclosure. [Wis. Stat.](#) § 48.396(5)(c). In delinquency and JIPS cases, the court must balance the person’s interest in recovering for any injury, damage, or loss he or she has suffered against the juvenile’s interest in rehabilitation and in avoiding stigma; the court must also balance the public’s interest in the redress of private wrongs through private litigation against the public’s interest in protecting the integrity of the juvenile justice system. See [Wis. Stat.](#) § 938.396(1j)(c)1., 2.; cf. [Wis. Stat.](#) § 938.396(1j)(c)3. (requiring balancing of petitioner’s legitimate educational interests, including safety interests, in information against society’s interest in protecting its confidentiality, when law enforcement agency denied school access to juvenile records under [Wis. Stat.](#) § 938.396(1)(c)3.). Some circuit courts have adopted local rules requiring judicial determination of whether to release records, so as to avoid potential problems that might arise when clerks of court or law enforcement agencies are compelled to make this determination. See generally, e.g., Dane Cnty. Juv. Ct. R. 601 (last updated May 1, 1999) (adopting *Dane County Juvenile Court Policy and Procedure Manual* “with the full force of circuit court rules”); *Dane County Juvenile Court Policy & Procedure Manual* § III, <https://juvenilecourt.countyofdane.com/documents/pdf/manual/procedure-manual-complete.pdf> (last visited Nov. 30, 2022) (access to records and confidentiality).

The scope of the disclosure allowed depends on the statutory language describing the nature of disclosure. That is, some statutory provisions permit making records “available for inspection,” while others authorize disclosure or providing access. Compare [Wis. Stat.](#) § 48.433(5) (agency “shall disclose”) and [Wis. Stat.](#) § 48.371 (agency “shall provide the following information”), with [Wis. Stat.](#) § 48.78(2) (ag) (agency may disclose record or make contents of record available for inspection). Therefore, the precise statutory language used in each provision determines the type of disclosure permitted.

In addition, it is important to define whether a particular document is part of an agency record, a court record, or a police record. The fact that a copy of a document appears in an agency file, for example, does not necessarily mean that its disclosure is governed by the rules applicable to agency files. For example, the Department of Children and Families (DCF) may have a copy of the court report in its files, but the court report is part of the court file and, therefore, is subject to the rules governing the confidentiality of court files.

## B. Police Records [§ 15.11]

### 1. In General [§ 15.12]

Police records of children must be kept separate from police records of adults, and police records of adult expectant mothers of unborn children must be kept separate from police records of other adults. [Wis. Stat.](#) §§ 48.396(1), 938.396(1)(a). In general, police records of children and adult expectant mothers are not open to inspection, nor may their contents be disclosed. [Wis. Stat.](#) §§ 48.396(1), 938.396(1)(a). The general rule of nondisclosure does not apply to the confidential exchange of information between the police and other specified agencies, in cases regarding children 10 years of age or older who are subject to the jurisdiction of adult court, and to representatives of the news media who wish to obtain information to report the news without revealing the identity of the child or adult expectant mother. [Wis. Stat.](#) §§ 48.396(1), 938.396(1)(b). Those who are permitted to exchange confidential information about a child are limited to officials of the public or private school attended by the child, other law enforcement agencies, and social welfare agencies. Under [Wis. Stat.](#) § 938.396(1)(c)4., a law enforcement agency may enter into an interagency agreement with a school board, a private school, a tribal school, a social welfare agency, or another law enforcement agency to provide for the routine disclosure of otherwise confidential information about a juvenile. There are other exceptions to this general rule, however, and they are described in sections [15.13–15.17](#), *infra*.

### 2. Access by or with Permission of Child, Expectant Mother, Parent, Guardian, or Legal Custodian [§ 15.13]

Subject to official agency policy, a law enforcement agency may provide a copy of any report of which the child or unborn child is the subject to the child (if he or she is 14 years of age or older), to the expectant mother (if she is 14 years of age or older), to the unborn child’s guardian ad litem, or to the parent, guardian, or legal custodian. [Wis. Stat.](#) §§ 48.396(1b), 938.396(1)(c)1.

In addition, the agency may release a report to anyone who has obtained written permission for release from the parent, guardian, legal custodian, or child (if he or she is 14 years of age or older), the expectant mother of an unborn child (if she is 14 years of age or older), or

the unborn child's guardian ad litem, and the permission specifically identifies the report to be released. [Wis. Stat. §§ 48.396\(1d\), 938.396\(1\)\(c\)2](#).

### 3. Access by School Officials [§ 15.14]

A law enforcement agency may, on its own initiative or on the request of a school-district administrator, private-school administrator, tribal-school administrator, or an administrator's designee, provide the administrator or designee any information in the agency's records relating to a particular student's use, possession, or distribution of alcohol or controlled substances or the illegal possession of a dangerous weapon. [Wis. Stat. § 938.396\(1\)\(c\)3.a., b.](#) The statute appears to authorize the law enforcement agency to determine which records or portion of records "relate to" drug and alcohol use or possession of a dangerous weapon. See [Wis. Stat. § 938.396\(1\)\(c\)3](#). *Dangerous weapon* is defined in [Wis. Stat. § 939.22\(10\)](#).

The law enforcement agency may also disclose—on its own initiative or on the request of a school-district administrator, private-school administrator, tribal-school administrator, or an administrator's designee—any information relating to the act for which the student was found delinquent, [Wis. Stat. § 938.396\(1\)\(c\)3.d.](#), or any records relating to an act for which a juvenile enrolled in the school district, private school, or tribal school was taken into custody under [Wis. Stat. § 938.19](#) based on a law enforcement officer's belief that the juvenile was committing (or had committed) an act that is a violation of any state or federal criminal law, [Wis. Stat. § 938.396\(1\)\(c\)3.c](#).

The school district, private school, or tribal school may use information disclosed in the above circumstances—relating to the student's drug or alcohol use, possession, or distribution; illegal possession of a dangerous weapon; delinquent act; or an act for which the student was taken into custody based on a law enforcement officer's belief that the student had committed a criminal offense—only for educational purposes, including safety purposes, and for the purpose of providing treatment programs for students. [Wis. Stat. § 118.127](#). A school district cannot use records obtained under these subsections as the sole basis for suspending or expelling a student or as the sole basis for taking any other disciplinary action against a pupil, but may use law enforcement officers' records obtained under [Wis. Stat. § 938.396\(1\)\(c\)3](#). as the sole basis for taking action against a pupil under the school district's athletic code. *Id.*

### 4. Access by Victims Under [Wis. Stat. Ch. 938](#) [§ 15.15]

Subject to agency policy, a law enforcement agency may disclose to a victim of a juvenile's act any information in its records relating to the injury, loss, or damage suffered by the victim, including the name and address of the juvenile and of the juvenile's parents. [Wis. Stat. § 938.396\(1\)\(c\)5](#). The victim may use this information only for seeking restitution. *Id.*

A victim's insurance company may, upon request, have access to law enforcement records if a juvenile who has been ordered to make restitution has not done so within one year after entry of the order. [Wis. Stat. § 938.396\(1\)\(c\)7](#). The insurer is entitled only to that information that is related to the injury, loss, or damage suffered by the victim, including the juvenile's name and address and the name and address of the juvenile's parents. *Id.* The insurer may use and disclose this information only for the purpose of investigating a claim arising from the juvenile's act. *Id.*

A victim-witness coordinator may request any information in law enforcement records relating to constitutional or statutory rights of victims, see [Wis. Stat. ch. 950](#), or relating to the provision of services to victims. [Wis. Stat. § 938.396\(1\)\(c\)6](#). If such a request is made, the law enforcement agency must disclose the information to the victim-witness coordinator. *Id.* The victim-witness coordinator can use the information only for enforcing the statutory and constitutional rights of victims or for providing services to victims. *Id.* The victim-witness coordinator can also disclose the name and address of the juvenile and the juvenile's parents to the victim. *Id.*

### 5. Access by Fire Investigators [§ 15.16]

A law enforcement agency may disclose to a fire investigator, upon request, information in its records related to a juvenile in order for the fire investigator to pursue an investigation under [Wis. Stat. § 165.55](#). [Wis. Stat. § 938.396\(1\)\(c\)8](#). The fire investigator may use or further disclose the information only for the purpose of pursuing that investigation. *Id.*

### 6. Traffic Violations [§ 15.17]

Police records involving traffic violations under [Wis. Stat. chs. 340–349](#) and [Wis. Stat. ch. 351](#) are generally not confidential. [Wis. Stat. § 938.396\(3\)](#). [Wis. Stat. § 938.396\(3\)](#) provides exceptions to the general rule of disclosure for the following: reports relating to the crimes of making a false statement in an application for a certificate of title, [Wis. Stat. § 342.06\(2\)](#); forged proof, [Wis. Stat. § 344.48\(1\)](#); and hit-and-run (by vehicle or boat) when death or injury occurs, [Wis. Stat. §§ 30.67\(1\), 346.67\(1\)](#).

## C. Department of Transportation Records [§ 15.18]

When a court revokes, suspends, or restricts a juvenile's operating privileges, the Department of Transportation (DOT) may not disclose information concerning the revocation, suspension, or restriction to anyone other than a court; district attorney; corporation counsel; city, village, or town attorney; law enforcement agency; a driver licensing agency of another jurisdiction; or the juvenile or his or her parent or guardian. [Wis. Stat.](#) § 938.396(4). Those to whom this information is disclosed may not disclose the information to other persons or agencies. *Id.*

## D. Agency Records [§ 15.19]

### 1. [In General](#) [§ 15.20]

In general, no agency may make available for inspection or disclose the contents of any record kept or information received about an individual in the agency's care or legal custody, except as provided by court order or by statutory provisions governing access to the types of records indicated below. [Wis. Stat.](#) §§ 48.78(2)(a), 938.78(2)(a). Under [Wis. Stat.](#) § 938.78(1), *agency* means "the department of children and families, the department of corrections, a county department, or a licensed child welfare agency." Under [Wis. Stat.](#) § 48.78(1), unless otherwise qualified, *agency* means "the department [of children and families], a county department, a licensed child welfare agency, or a licensed child care center." The court of appeals has held that only the juvenile court may issue an inspection or disclosure order under [Wis. Stat.](#) § 48.78(2)(a), although a defendant's request based on the assertion that he or she is entitled to the adult criminal court's in camera inspection of juvenile court records under the Confrontation Clause, compulsory process, and due process is properly brought before the criminal trial court under [Pennsylvania v. Ritchie](#), 480 U.S. 39 (1987). [Rock Cnty. Dep't of Soc. Servs. v. DeLeu \(In the Int. of K.K.C.\)](#), 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988).

[Wis. Stat.](#) §§ 48.78(2)(a) and 938.78(2)(a) recognize certain statutes that provide access to specific types of records, including the following:

1. Medical information concerning the child and birth parent after the parent's parental rights have been terminated, [Wis. Stat.](#) § 48.432;
2. Identifying information about parents after termination of parental rights, [Wis. Stat.](#) § 48.433;
3. Information related to a person's change of county of residence and the services offered or being provided by the DCF, [Wis. Stat.](#) § 48.48(17)(bm);
4. Information related to a person's change of county of residence and the services offered or being provided by a county department, [Wis. Stat.](#) §§ 48.57(2m), 938.57(2m);
5. Adoption records, [Wis. Stat.](#) § 48.93;
6. Records related to abused or neglected children or abused unborn children, [Wis. Stat.](#) § 48.981(7);

**Note.** [Wis. Stat.](#) § 48.981(7) specifies to whom, and under what circumstances, child-abuse and child-neglect records, as well as records related to abused unborn children, may be released. For example, under [Wis. Stat.](#) § 48.981(7)(a)3., reports and records may be disclosed to a health-care provider, as defined in [Wis. Stat.](#) § 146.81(1)(a)–(p), for purposes of diagnosis and treatment. Certain exceptions to the strict confidentiality requirements also exist under the statute. For example, under [Wis. Stat.](#) § 48.981(7)(cm), the agency may disclose information from its records for use in restraining order and injunction proceedings under [Wis. Stat.](#) §§ 48.25(6), 813.122, and 813.125. [Wis. Stat.](#) § 48.981(7)(cr) requires disclosure to the public of certain information when a child has died or is in serious or critical condition as a result of abuse or neglect. Information will not be released if the information would jeopardize any ongoing or future criminal or civil investigative proceedings, if such information would affect the fairness of a proceeding. [Wis. Stat.](#) § 48.981(7)(cr)7. Any disclosure under [Wis. Stat.](#) § 48.981(7)(cr) must not identify the child, the parent or caregiver, the alleged abuser, or the reporter of the abuse or neglect, and it must not include information that would not be in the best interests of the child or of "any member of the child's family, any member of the child's household who is a child, or any caregiver of the child." [Wis. Stat.](#) § 48.981(7)(cr)6.

In addition, [Wis. Stat.](#) § 48.981(7)(cp) allows an agency to disclose a determination made before January 1, 2015, that a person has abused or neglected a child for purposes of a background check under [Wis. Stat.](#) § 48.685, 48.686, or 50.065 only if that determination



has not been reversed or modified on appeal. An agency may disclose such a determination made on or after January 1, 2015, for those purposes only as provided in [Wis. Stat. § 48.981\(3\)\(c\)5r](#). [Wis. Stat. § 48.981\(7\)\(cp\)](#).

7. Certain information that must be provided to foster parents or other substitute care providers, [Wis. Stat. §§ 48.371, 938.371](#);

**Note.** [Wis. Stat. §§ 48.371\(1\) and \(3\) and 938.371\(1\) and \(3\)](#) place limitations on the information that must be provided to substitute care providers. For example, the statutes do not authorize release of the permanency plan or court report, although some information from these documents must be provided. The operators of a group home, residential care center for children and youth, or juvenile correctional facility in which the child is placed are substitute care providers, as are foster parents and relatives (other than parents) with whom the child is placed.

8. Information requested for purposes of permanency review procedures, [Wis. Stat. §§ 48.38\(5\)\(b\), \(d\), \(5m\)\(d\), 938.38\(5\)\(b\), \(d\), \(5m\)\(d\)](#);
9. Information from the DCF's statewide automated child welfare information system, [Wis. Stat. § 48.396\(3\)\(bm\)](#);
10. Electronic court records, [Wis. Stat. §§ 48.396\(3\)\(c\)1r, 938.396\(2m\)\(c\)1r](#);
11. Information that an agency must share with law enforcement agencies and the National Center for Missing and Exploited Children when the agency determines that a child over whom the agency has placement, care, or supervision responsibility is missing, [Wis. Stat. §§ 48.78\(2m\), 938.78\(2m\)](#);
12. Information related to a juvenile's release or escape from correctional custody or supervision, [Wis. Stat. § 938.51](#); and
13. Information related to a juvenile's escape or absence from a juvenile correctional facility, juvenile detention facility, residential care center for children and youth, secured residential care center for children and youth, inpatient facility, or juvenile portion of a county jail, [Wis. Stat. § 938.78\(3\)](#); *see* [Wis. Stat. § 51.01\(10\)](#) (defining *inpatient facility*); *see also* *infra* [§ 15.24](#).

There are other statutory exceptions to the general rule of confidentiality, and they are as described in sections [15.21–15.26](#), *infra*.

## 2. Access by or with Permission of Child, Expectant Mother, Parent, Guardian, or Legal Custodian [§ 15.21]

If a child or expectant mother who is 14 years old or older, the child's or child expectant mother's parent, guardian, or legal custodian, or an unborn child's guardian ad litem requests access to information contained in agency files relating to the child or unborn child, the agency may make available or disclose the information to the child, the expectant mother, the unborn child's guardian ad litem, or the parent, guardian, or legal custodian, unless the agency determines that disclosure would result in imminent danger to anyone. [Wis. Stat. §§ 48.78\(2\)\(ag\), \(aj\), 938.78\(2\)\(ag\)](#). This same standard applies to those to whom a child, an expectant mother, an unborn child's guardian ad litem, or a parent, guardian, or legal custodian has granted written permission for disclosure. [Wis. Stat. §§ 48.78\(2\)\(am\), \(ap\), 938.78\(2\)\(am\)](#).

## 3. Confidential Exchange of Information Between Agencies [§ 15.22]

The general rule of confidentiality also does not apply to the confidential exchange of information between an agency and another agency, a social welfare agency, a law enforcement agency, a victim-witness coordinator, a fire investigator, a health-care provider (as defined in [Wis. Stat. § 146.81\(1\)\(a\)–\(p\)](#)), or a public or private school regarding an individual in the care or legal custody of one of the agencies. [Wis. Stat. §§ 48.78\(2\)\(b\), 938.78\(2\)\(b\)](#). Under [Wis. Stat. § 938.78\(2\)\(b\)1m.](#), an agency may enter into an interagency agreement with a school board, a private school, a tribal school, a law enforcement agency, or another social welfare agency to provide for the routine disclosure of otherwise confidential information about a juvenile. [Wis. Stat. §§ 48.78\(2\)\(b\) and 938.78\(2\)\(b\)](#) do not limit the information that may be exchanged, other than as protected by tribal school policy or tribal law. The statutes do, however, require the social welfare agency, law enforcement agency, victim-witness coordinator, fire investigator, health-care provider, or public or private school to keep the information confidential upon receipt.

## 4. Access by Department of Corrections [§ 15.23]

Under certain circumstances, the Department of Health Services (DHS) or a county department may disclose to the Department of Corrections information about an individual who has formerly been any of the following: placed in a secured correctional facility in the custody or supervision of the DHS, *see* [Wis. Stat. § 48.34\(4m\)](#) (1993–94); provided with aftercare supervision by the DHS or a county

department, [Wis. Stat.](#) § 48.34(4n) (1993–94); provided with aftercare supervision under [Wis. Stat.](#) § 938.34(4n); or placed in a Type 2 residential care center for children and youth, [Wis. Stat.](#) § 938.34(4d). This information may be disclosed to the Department of Corrections if the individual is the subject of a presentence investigation pursuant to [Wis. Stat.](#) § 972.15, under sentence to the Wisconsin state prisons, on probation to the Department of Corrections, or on parole or extended supervision. [Wis. Stat.](#) §§ 48.78(2)(d)1., 2., 4., 5., 938.78(2)(d)1., 2., 4., 5.

## 5. Records Relating to Juveniles Who Have Escaped from Certain Facilities, Centers, or Jails [§ 15.24]

If a juvenile is adjudicated delinquent and placed in a juvenile correctional facility, residential care center for children and youth, secured residential care center for children and youth, inpatient facility, as defined in [Wis. Stat.](#) § 51.01(10), juvenile detention facility, or the juvenile portion of a county jail for committing any crime specified under [Wis. Stat.](#) § 938.78(3) and has escaped or has failed to return from an authorized leave for more than 12 hours from when the leave expired, the Department of Corrections or county department, whichever has supervision over the juvenile, may release the juvenile's name and any information that the department determines is necessary for the protection of the public or to secure the juvenile's return to the facility. [Wis. Stat.](#) § 938.78(3). This section also applies if the juvenile has escaped from the custody of a peace officer or guard at such a facility, center, or jail.

**Comment.** The court of appeals has held that [Wis. Stat.](#) § 48.78 (the precursor to current [Wis. Stat.](#) §§ 48.78 and 938.78) provided two bases of authority for an agency to release information: under one of the articulated circumstances or by order of the court. *Peter B. v. State (In the Int. of Peter B.)*, 184 Wis. 2d 57, 516 N.W.2d 746 (Ct. App. 1994). Although [Wis. Stat.](#) § 48.78 did not (and the current statutes do not) articulate the standard to be used by the court in determining whether to disclose the information, in upholding the circuit court's decision to disclose, the court of appeals noted that the court had properly considered both the public's protection and the best interests of the child. *Id.* at 72. The court emphasized, however, that “[a]ny compromise of essential confidentiality must be ordered only with the utmost care.” *Id.* at 73.

[Wis. Stat.](#) ch. 51 also articulates specific exceptions to the general rule of nondisclosure. [Wis. Stat.](#) § 51.30(4)(b)4. includes a provision that a record may be released “[p]ursuant to lawful order of a court.” The Wisconsin Supreme Court has held that, under [Wis. Stat.](#) § 51.30(4)(b), the circuit court may release [Wis. Stat.](#) ch. 51 court records under one of the articulated statutory exceptions or by order of the court when the requested access is comparable to one of the [Wis. Stat.](#) § 51.30(4)(b) exceptions. *Billy Jo W. v. Metro (In re Mental Condition of Billy Jo W.)*, 182 Wis. 2d 616, 639, 514 N.W.2d 707 (1994). Using this analysis, defense counsel could argue that the court can order disclosure under [Wis. Stat.](#) § 48.78 or [Wis. Stat.](#) § 938.78 only when the requested access is comparable to one of the [Wis. Stat.](#) § 48.78 or [Wis. Stat.](#) § 938.78 exceptions to the general rule of nondisclosure.

## 6. Records Relating to Juveniles Alleged to Be Sexual Predators [§ 15.25]

An agency must, upon request, disclose information related to an individual who is the subject of a [Wis. Stat.](#) ch. 980 proceeding or evaluation to the Department of Corrections, the DHS, the Department of Justice, or a district attorney for use in the prosecution of the [Wis. Stat.](#) ch. 980 proceeding or evaluation. [Wis. Stat.](#) § 938.78(2)(e). The Department of Corrections, the DHS, the Department of Justice, or a district attorney may disclose such information for any purpose consistent with the [Wis. Stat.](#) ch. 980 proceeding. *Id.* The court in which the [Wis. Stat.](#) ch. 980 proceeding is pending may issue a protective order for information released under these circumstances. *Id.*

## 7. Records Relating to Individuals Seeking Credentialing [§ 15.26]

The Department of Corrections may disclose information about an individual in its care or custody to the Department of Safety and Professional Services if that department has requested the information in investigating misconduct or in investigating whether the person should be credentialed under [Wis. Stat.](#) ch. 448 (medical practices), [Wis. Stat.](#) ch. 455 (psychology examining board), or [Wis. Stat.](#) ch. 457 (marriage and family therapy, professional counseling, and social work examining board). Information disclosed under these circumstances must be kept confidential, unless further disclosure is authorized by the court or is necessary to conduct the investigation for which the information was obtained. [Wis. Stat.](#) § 938.78(2)(g).

## E. Court Records [§ 15.27]

### 1. In General [§ 15.28]

Juvenile court records are confidential and are to be kept in books or files separate from other court records. [Wis. Stat.](#) §§ 48.396(2)(a), 938.396(2)(a). The records of a municipal court exercising jurisdiction over violations of civil laws or ordinances under [Wis. Stat.](#) § 938.17(2) are likewise confidential. See [Wis. Stat.](#) § 938.396(2)(a).



**Note.** Generally applicable Wisconsin rules of civil procedure governing the protection, sealing, and redaction of certain confidential information in circuit court records—specifically, Social Security numbers, employer or taxpayer identification numbers, financial account numbers, driver’s license numbers, and passport numbers—also apply to proceedings under the Children’s Code and Juvenile Justice Code. [Wis. Stat.](#) §§ 48.396(2)(ad), 801.19–.21, 938.396(2)(b).

Juvenile court records are not open to inspection, nor may their contents be disclosed except by order of the court or under the authority of specified statutory provisions—*see, e.g.,* [Wis. Stat.](#) §§ 48.375(7)(e) (confidentiality of records for children seeking abortions), 48.396(3)(b), (c)1g., 1m., 1r., 938.396(2m)(b), (c) (electronic court records), 48.396(6), 938.396(10) (juveniles alleged to be sexual predators), 938.396(2g) (exceptions to confidentiality). [Wis. Stat.](#) §§ 48.396(2)(a), 938.396(2)(a); *see also infra* [ch. 18](#) (parental consent for minor’s abortion). The records may also be reviewed by authorized representatives of the DCF, the Department of Corrections, or a federal agency to monitor and conduct periodic evaluations, as required by federal law, [Wis. Stat.](#) §§ 48.396(2)(b)1., 938.396(2g)(b)1. In *State v. Christian*, 142 Wis. 2d 742, 748–49, 419 N.W.2d 319 (Ct. App. 1987), the court of appeals held that the circuit court erred in admitting transcripts from a CHIPS hearing that were removed from the juvenile file by the prosecutor in a criminal case without a court order, although the appellate court concluded that the error was harmless.

What is the standard the court should use in determining whether to release information from a juvenile court record? [Wis. Stat.](#) §§ 48.35(2) and 938.35(2) articulate one standard: if disclosure is in the best interests of the child, unborn child, or the administration of justice.

**Comment.** [Wis. Stat.](#) § 967.06, which governs representation of juveniles by the State Public Defender’s Office, takes precedence over [Wis. Stat.](#) § 48.396(2). Therefore, a public defender has the right to request and receive the record of a client that the public defender represents. *S.M.O. v. Resheske (In re State ex rel. S.M.O.)*, 110 Wis. 2d 447, 329 N.W.2d 275 (Ct. App. 1982). Because [Wis. Stat.](#) § 938.396(2) and (2g) contain language similar to that in [Wis. Stat.](#) § 48.396(2) and *S.M.O.* was decided before enactment of the Juvenile Justice Code, the holding would presumably apply to [Wis. Stat.](#) § 938.396(2) and (2g) as well.

Even under the numerous statutory exceptions discussed in sections [15.29–15.44](#), *infra*, access to juvenile court files is limited in scope, depending on who is requesting the information. Access to certain documents, such as court reports, permanency plans, and any psychological evaluations, continues to be highly restrictive, just as certain portions of juvenile court proceedings relating to sensitive personal matters remain closed.

## 2. Access by or with Permission of Child, Expectant Mother, Parent, Guardian, or Legal Custodian [§ 15.29]

If a child or expectant mother who is 14 years old or older, the child’s or child expectant mother’s parent, guardian, or legal custodian, or an unborn child’s guardian ad litem requests access to the court file relating to the child or unborn child, the court must open the court file for inspection by the child, expectant mother, unborn child’s guardian ad litem, parent, guardian, or legal custodian, unless the court finds, after due notice and hearing, that disclosure would result in imminent danger to anyone. [Wis. Stat.](#) §§ 48.396(2)(ag), (aj), 938.396(2g)(ag). This same standard applies to those to whom a child, expectant mother, unborn child’s guardian ad litem, parent, guardian, or legal custodian has granted written permission for disclosure. [Wis. Stat.](#) §§ 48.396(2)(am), (ap), 938.396(2g)(am).

## 3. Access by School Officials [§ 15.30]

If a JIPS or delinquency petition has been filed alleging that a juvenile has committed a delinquent act that would be a felony if committed by an adult, the court clerk must notify the school board of the school district, the governing body of the private school, or the governing body of the tribal school in which the juvenile is enrolled of the fact that a petition has been filed, as well as the nature of the delinquent act on which the petition is based. [Wis. Stat.](#) § 938.396(2g)(m)1. Once a juvenile is adjudicated delinquent, the clerk must notify the school board, the governing body of the private school, or the governing body of the tribal school, within five days after entry of the dispositional order, of the following: the adjudication, the nature of the violation, and the disposition ordered, including whether school attendance is a condition of the dispositional order. [Wis. Stat.](#) § 938.396(2g)(m)2., 3. The same notification requirement applies for a juvenile found to have committed a delinquent act at the request of or for the benefit of a criminal gang if that act would have been a felony if committed by an adult. [Wis. Stat.](#) § 938.396(2g)(m)4.; *see* [Wis. Stat.](#) § 939.22(9) (defining *criminal gang*).

The clerk must notify the school board of the district, the governing body of the private school, or the governing body of the tribal school at which the juvenile attends school of the information indicated above if the juvenile has been placed in a new school district, new private school, or new tribal school as a result of a dispositional order following adjudication. [Wis. Stat.](#) § 938.396(2g)(m)5. In addition, the court must also notify the new school district or new governing body of any previous delinquency adjudications, the nature of any previous violations committed by the juvenile, and dispositions ordered as a result of these previous violations. *Id.*

Any information that the clerk discloses to a public school district or private school may, in turn, be disclosed only to those school employees working directly with the student or having a legitimate interest in the information. [Wis. Stat.](#) § 938.396(2g)(m)6. (In the case of information disclosed to the governing body of a tribal school, the court must “request” that the school disclose the information only to such employees.) The “legitimate interest” involved must be an educational interest. This includes a safety interest. No other information may be disclosed to the school board or governing body of a private school or tribal school unless ordered by the court. *Id.*

#### 4. Access by Victims [§ 15.31]

A victim-witness coordinator may disclose to a victim of a juvenile’s act or alleged act the name and address of the juvenile and the juvenile’s parents. [Wis. Stat.](#) § 938.396(2g)(f).

In addition, each known victim of a juvenile’s act is entitled to timely notice of the following: the procedure for obtaining the identity of the juvenile and the juvenile’s parents, [Wis. Stat.](#) § 938.346(1)(a); the procedure for obtaining the juvenile’s police records, [Wis. Stat.](#) § 938.346(1)(b); the potential liability of the juvenile’s parents under [Wis. Stat.](#) § 895.035, [Wis. Stat.](#) § 938.346(1)(c); and general information regarding the disposition of the case, including any deferred prosecution agreement or consent decree, [Wis. Stat.](#) § 938.346(1)(d)1., or the procedure for the victim to obtain this information, [Wis. Stat.](#) § 938.346(1)(d)2. Each known victim of a juvenile’s act also is entitled to timely notice of the procedure for requesting that the juvenile undergo testing for HIV or a sexually transmitted disease if the juvenile is alleged to have committed certain sex crimes, [Wis. Stat.](#) § 938.346(1)(e); the right to confer with the intake worker or prosecutor regarding deferred prosecution agreements, consent decrees, and other possible outcomes of the case, [Wis. Stat.](#) § 938.346(1)(em); the right to request and receive notices of any hearing the victim may attend, [Wis. Stat.](#) § 938.346(1)(f); and any other rights the victim has, [Wis. Stat.](#) § 938.346(1)(fm), (g), (h). The adult victim, or the parent, guardian, or legal custodian of a child victim, must also receive timely notice of the procedure for requesting that the juvenile undergo tests to determine the presence of communicable diseases if the juvenile is alleged to have violated [Wis. Stat.](#) § 946.43(2m). [Wis. Stat.](#) § 938.346(1)(ec). [Wis. Stat.](#) § 946.43(2m) prohibits prisoners from throwing or expelling bodily substances, such as blood, vomit, or urine, toward officers, employees, or visitors of the prison.

The court must disclose to a victim’s insurance company the amount of restitution that the court has ordered the juvenile to pay to the victim. [Wis. Stat.](#) § 938.396(2g)(fm).

A victim-witness coordinator may request any information in court records relating to constitutional or statutory rights of victims or the provision of services to victims, including the name and address of the juvenile and the juvenile’s parents. [Wis. Stat.](#) § 938.396(2g)(f). If such a request is made, the court must open for inspection by the victim-witness coordinator relevant portions of the court record. *Id.* However, the victim-witness coordinator can use the information only to enforce the statutory and constitutional rights of a victim, to provide services to a victim, or to disclose the name and address of the juvenile’s parents to a victim of the juvenile’s act. *Id.*

#### 5. Access by Law Enforcement Agencies [§ 15.32]

Upon request of a law enforcement agency to review court records for the purpose of investigating alleged criminal activity or activity that may result in a court exercising jurisdiction under [Wis. Stat.](#) § 938.12 or [Wis. Stat.](#) § 938.13(12), the court assigned to exercise jurisdiction under [Wis. Stat.](#) ch. 938 and [Wis. Stat.](#) ch. 48 must open for inspection by authorized representatives of the requester the court records relating to any juvenile who has been the subject of a proceeding under [Wis. Stat.](#) ch. 938. [Wis. Stat.](#) § 938.396(2g)(c).

#### 6. Access by Fire Investigators [§ 15.33]

Authorized representatives of a fire investigator may, upon request and for the purpose of conducting an investigation, review juvenile court records relating to juveniles who have been adjudicated delinquent or found in need of protection or services for a violation of arson or other fire-related crimes. [Wis. Stat.](#) § 938.396(2g)(j).

#### 7. Access to Monitor Compliance with Federal Regulations [§ 15.34]

The court must open court records for inspection when requested by the DCF, the Department of Corrections, or a federal agency for the requesting department or agency to monitor activities and evaluate compliance with federal law. [Wis. Stat.](#) §§ 48.396(2)(b)1., 938.396(2g)(b)1. Only authorized representatives are provided access under these circumstances. [Wis. Stat.](#) §§ 48.396(2)(b)1., 938.396(2g)(b)1. Those representatives must keep the disclosed records confidential and can use and further disclose them only for the purpose for which they were requested.

## 8. Access by Researchers [§ 15.35]

Upon a request of an entity engaged in the bona fide research, monitoring, or evaluation of activities conducted under 42 [U.S.C.](#) § 629h, as determined by the director of state courts, to review court records for the purpose of that research, monitoring or evaluation, the court must open those records for inspection and copying by authorized representatives of that entity. Those representatives must keep those records confidential and may use and further disclose those records only for the purposes for which those records were requested. The director of state courts may use the circuit court automated information system under [Wis. Stat.](#) § 758.19(4) to facilitate the transfer of electronic records between the court and that entity. [Wis. Stat.](#) §§ 48.396(2)(b)2., 938.396(2g)(b)2.

## 9. Access to Information for Firearms-Restrictions Record Search or Concealed-Weapon-License Background Check [§ 15.36]

If a juvenile is adjudicated delinquent based on a violation that would be a felony if committed by an adult, the clerk must notify the Department of Justice of that fact. [Wis. Stat.](#) § 938.396(2g)(n). No other information may be disclosed to the Department of Justice except by order of the court. *Id.* The department may use the information only as part of a firearms-restrictions record search or a concealed-weapon-license background check. *Id.* [Wis. Stat.](#) § 175.35(2g)(c) governs firearms-restrictions record searches, and [Wis. Stat.](#) § 175.60(9g) (a) governs background checks for licenses to carry concealed weapons.

## 10. Access Relating to Juveniles Alleged to Be Sexual Predators [§ 15.37]

Law enforcement records, children's court ([Wis. Stat.](#) ch. 48) records, and juvenile court ([Wis. Stat.](#) ch. 938) records must be open for inspection by the Department of Corrections, the DHS, the Department of Justice, or a district attorney for use in the prosecution of a [Wis. Stat.](#) ch. 980 proceeding or evaluation if the records relate to a person who is the subject of a [Wis. Stat.](#) ch. 980 proceeding or evaluation. [Wis. Stat.](#) §§ 48.396(6), 938.396(10). The Department of Corrections, the DHS, the Department of Justice, or a district attorney may disclose such information for any purpose consistent with the [Wis. Stat.](#) ch. 980 proceeding. [Wis. Stat.](#) §§ 48.396(6), 938.396(10). The court in which the [Wis. Stat.](#) ch. 980 proceeding is pending may issue a protective order for information released under these circumstances. [Wis. Stat.](#) §§ 48.396(6), 938.396(10).

## 11. Access Relating to Juveniles Required to Register as Sex Offenders [§ 15.38]

The court must open for inspection court records of any juvenile adjudicated delinquent or found not responsible by reason of mental disease or defect or found in need of protection or services for a sex offense to the Department of Corrections if an authorized representative of the requester requests this information for the purpose of obtaining information about a child required to register as a sex offender. [Wis. Stat.](#) § 938.396(2g)(em). The department may disclose this information as provided under [Wis. Stat.](#) § 301.46. *Sex offense* is defined in [Wis. Stat.](#) § 301.45(1d)(b). [Wis. Stat.](#) § 301.45 governs the sex-offender registration requirements.

**Practice Tip.** These provisions apply to all juveniles who are required to register. All information provided by the juvenile to the registry remains in the registry even after the period of supervision expires, the adjudication is expunged, or the juvenile becomes an adult. The only way to expunge information from the sex-offender registry is to have the dispositional order that required registration reversed, vacated, or set aside. A motion to reverse, vacate, or set aside can be filed after the dispositional order has expired. *State v. Stephen T. (In the Int. of Stephen T.)*, 2002 WI App 3, ¶ 11, 250 Wis. 2d 26, 643 N.W.2d 151. If the court reverses, vacates, or sets aside the juvenile adjudication and the juvenile wants the adjudication removed from the registry, the juvenile must make a written request for expungement of the information in the registry and provide a certified copy of the court's order reversing, vacating, or setting aside the adjudication. [Wis. Stat.](#) § 301.45(7)(d).

## 12. Access by Defense Counsel [§ 15.39]

Defense counsel (or his or her authorized representative) is entitled to inspect juvenile court records relating to a client to prepare a defense to an allegation of delinquent or criminal activity by the client. [Wis. Stat.](#) § 938.396(2g)(dm); *cf. State v. A.S.W. (In the Int. of A.S.W.)*, Nos. 2015AP2119, 2015AP2120, 2016 WL 5794340 (Wis. Ct. App. Oct. 5, 2016) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)); *see supra* § 15.10.

## 13. Access by "the Requester" [§ 15.40]

Anyone may request to see court records relating to a juvenile who has been alleged to be delinquent for violating one of the serious-juvenile-offender violations articulated in [Wis. Stat. § 938.34\(4h\)\(a\)](#) or for committing a violation that would be a felony if committed by an adult, if the juvenile has a prior delinquency adjudication that remains of record and unreversed. [Wis. Stat. § 938.396\(2g\)\(k\)](#), (L). The requester would have to know the juvenile's name and the nature of pending delinquency charges to seek this information. In addition, with respect to juveniles not alleged to have committed a serious juvenile offender violation, the requester would have to have knowledge about the juvenile's prior juvenile record before he or she would be able to demonstrate grounds for disclosure. The court must open for inspection the court record to the requester, except that the requester cannot have access to court reports, permanency plans, or other records dealing with sensitive personal information of the juvenile and the juvenile's family. *Id.* The requester may disclose any information properly discovered under these circumstances to anyone else. *Id.*

#### 14. Access Relating to Caregiver Background Checks [§ 15.41]

If a juvenile is adjudicated delinquent for committing a *serious crime* specified under [Wis. Stat. § 48.685\(1\)\(c\)](#) or [Wis. Stat. § 48.686\(1\)\(c\)](#), the court clerk must notify the Department of Justice of that fact. [Wis. Stat. § 938.396\(2g\)\(o\)](#). That department may disclose this information only as part of a criminal history record search under [Wis. Stat. § 48.685\(2\)\(am\)1.](#) or (b)1m. or [Wis. Stat. § 48.686\(2\)\(am\)](#), which involves checking the backgrounds of caregivers in child welfare agencies, foster homes, group homes, shelter care facilities, or child care centers. [Wis. Stat. § 938.396\(2g\)\(o\)](#).

#### 15. Traffic Violations [§ 15.42]

Court records involving traffic violations under [Wis. Stat.](#) chs. 340–349 and [Wis. Stat.](#) ch. 351, generally are not confidential. Excepted are reports relating to the crimes of making a false statement in an application for a certificate of title, [Wis. Stat. § 342.06\(2\)](#), forged proof, [Wis. Stat. § 344.48\(1\)](#), and hit-and-run (by vehicle or boat) when death or injury occurs, [Wis. Stat. §§ 346.67, 306.67\(1\)](#), which are confidential, [Wis. Stat. § 938.396\(3\)](#).

#### 16. [Access by Foster Parents and Other Physical Custodians](#) [§ 15.43]

The agency responsible for preparing the permanency plan must provide to the foster parent, the relative (other than a parent) in whose home the child is placed, or the operator of a group home, residential care center for children and youth, or juvenile correctional facility information contained in the permanency plan or court report relating to the child's mental, emotional, cognitive, developmental, or behavioral disability. [Wis. Stat. §§ 48.371\(3\)\(a\), 938.371\(3\)\(a\)](#). Those who receive this information must keep it confidential and may disclose the information only for the purposes of providing care for the child or participating in a court hearing or permanency review. [Wis. Stat. §§ 48.371\(5\), 938.371\(5\)](#). Other information may not be disclosed, nor may the agency provide copies of the court report or permanency plan.

Foster parents and other physical custodians are also entitled to information related to the child's involvement in a criminal gang, as defined in [Wis. Stat. § 939.22\(9\)](#); the child's involvement in any activities that are harmful to the child's physical, mental, or moral well-being; any involvement of the child, either as a victim or perpetrator, in certain sexual activities; and the religious affiliation or belief of the child. [Wis. Stat. §§ 48.371\(3\)\(b\)–\(e\), 938.371\(3\)\(b\)–\(e\)](#). Those who receive this information must keep it confidential and may disclose the information only for the purposes of providing care for the child or participating in a court hearing or permanency review. [Wis. Stat. §§ 48.371\(5\), 938.371\(5\)](#).

#### 17. Other Court Proceedings [§ 15.44]

The disposition of a child or unborn child and any record of evidence given in a hearing under [Wis. Stat. ch. 48](#) and [Wis. Stat. ch. 938](#) is not admissible as evidence against the child or expectant mother in any case or proceeding in any other court except for the following:

1. In other juvenile court proceedings or municipal court proceedings involving violations of civil laws or ordinances for children 12 years of age or older, [Wis. Stat. §§ 48.35\(1\)\(b\)2., 938.35\(1\)\(b\)](#); *see also* [Wis. Stat. §§ 48.396\(2\)\(g\), 938.396\(2g\)\(gm\)](#);
2. In sentencing proceedings in adult court after conviction, and then only for the purpose of a presentence investigation, [Wis. Stat. §§ 48.35\(1\)\(b\)1., 938.35\(1\)\(a\)](#); *see also* [Wis. Stat. §§ 48.396\(2\)\(dr\), 938.396\(2g\)\(dr\)](#); *Hammill v. State*, 52 Wis. 2d 118, 187 N.W.2d 792 (1971) (holding that sentencing court may review prior juvenile court proceedings and delinquency adjudications involving the defendant); or



**Note.** The circuit court should review in camera confidential and sealed juvenile records when a dispute arises as to the accuracy of information provided at an adult criminal sentencing hearing regarding those juvenile records. A defendant has a due-process right to be sentenced on accurate information. The only way to settle such a dispute regarding juvenile records is to provide for this in camera review. State v. Moore, 2006 WI App 162, 295 Wis. 2d 514, 721 N.W.2d 725.

3. In a court of civil or criminal jurisdiction while it is exercising jurisdiction over an action affecting the family and is considering the custody or paternity of a child, Wis. Stat. §§ 48.35(1)(b)3., 938.35(1)(c); *see also* Wis. Stat. §§ 48.396(2)(dm), (h), 938.396(2g)(g), (h).

In addition, Wis. Stat. ch. 938 dispositions are admissible in bail hearings and for impeachment purposes in both criminal and civil cases. Wis. Stat. § 938.35(1)(cm); *see also* Wis. Stat. § 938.396(2g)(d). Criminal courts are also entitled to juvenile court records for the purpose of conducting or preparing for a proceeding in that court, as are district attorneys for the purpose of performing their official duties in a proceeding in a criminal court. Wis. Stat. § 938.396(2g)(d).

The fact that a juvenile has been adjudicated delinquent for unlawfully and intentionally killing a person is admissible in determining whether any property will transfer to the juvenile by reason of the victim's death. Wis. Stat. § 938.35(1)(d); *see also* Wis. Stat. § 938.396(2g)(i). Wis. Stat. § 854.14 governs the inheritance rights of a beneficiary who unlawfully and intentionally kills a decedent.

## F. School Records [§ 15.45]

Under Wis. Stat. ch. 938, a law enforcement agency may petition for and the court may order review of school records not otherwise available to police that are necessary for the agency to investigate alleged delinquent or criminal activity. Wis. Stat. § 938.396(1)(d). Only those agency employees who are working on the investigation may have access to the records. *Id.*

Likewise, a fire investigator may petition for and the court may order review of school records not otherwise available to the fire investigator that are necessary for a fire investigation. *Id.* Only those employees who are working on the fire investigation may have access to the records. *Id.*

The Department of Corrections, a county department, or a licensed child welfare agency may petition the court to order disclosure of school records that cannot otherwise be disclosed under Wis. Stat. ch. 118, to provide treatment or care for an individual in the agency's care or legal custody. Wis. Stat. § 938.78(2)(b)2.

## G. Medical Records: Test Results Under Wis. Stat. § 938.296 [§ 15.46]

Wis. Stat. § 938.296 mandates testing for HIV and sexually transmitted diseases under certain circumstances. The results of these tests must be disclosed to the juvenile's parent, guardian, or legal custodian, Wis. Stat. § 938.296(4)(a); to the victim or alleged victim (if the victim is an adult), Wis. Stat. § 938.296(4)(b); and to the victim's or alleged victim's parent, guardian, or legal custodian (if the victim is a child), Wis. Stat. § 938.296(4)(c). Under both Wis. Stat. ch. 48 and Wis. Stat. ch. 938, if a child is placed in a foster home, group home, residential care center for children and youth, or juvenile correctional facility, or in the home of a relative (other than a parent), the agency that placed the child must provide the test results to the foster parent, the relative, or the operator of the group home, residential care center for children and youth, or juvenile correctional facility at the time of placement. Wis. Stat. §§ 48.371(1), 938.371(1). These physical custodians also have the right to other medical information concerning the child placed in their care, including any test results for hepatitis B. Wis. Stat. §§ 48.371(1)(b), (c), 938.371(1)(b), (c). The recipients must keep the test results confidential and may disclose the results only for the purposes of providing care for the child or participating in a court hearing or permanency review regarding the child. Wis. Stat. §§ 48.371(5), 938.371(5).

In addition, under Wis. Stat. ch. 938, upon request, the court must order the results disclosed to the health-care provider of the tested juvenile and the health-care provider of the victim (or alleged victim). Wis. Stat. § 938.296(4)(d), (e).

The adult victim, or the parent, guardian, or legal custodian of a child victim, must receive timely notice of the procedure for requesting that the juvenile undergo tests to determine the presence of communicable diseases if the juvenile is alleged to have violated Wis. Stat. § 946.43(2m). Wis. Stat. § 938.346(1)(ec). (Wis. Stat. § 946.43(2m) prohibits prisoners from throwing or expelling bodily substances, such as blood, vomit, or urine, toward officers, employees, or visitors of the prison.) Wis. Stat. § 938.296(2m) requires the district attorney or corporation counsel to apply for court-ordered testing if the victim requests it and certain conditions regarding the risk of disease are met.

## IV. Sanctions for Disclosure of Information [§ 15.47]

Any person who improperly divulges any information under [Wis. Stat.](#) ch. 48 or [Wis. Stat.](#) ch. 938 is subject to a contempt proceeding under [Wis. Stat.](#) ch. 785. [Wis. Stat.](#) §§ 48.299(1)(b), 938.299(1)(b); *see infra* [ch. 16](#). This sanction, however, does not preclude victims of a juvenile's act from suing civilly. [Wis. Stat.](#) § 938.299(1)(b). *But see Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (holding that, under the 1st and 14th Amendments to the U.S. Constitution, the media cannot be prevented from disclosing the identity of a juvenile that had not been acquired unlawfully, but had been publicly revealed in connection with prosecution of the crime).

## V. Standard Juvenile Court Forms [§ 15.48]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

### Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938 Wisconsin Records Management Committee

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose  |
|--------------------------|---------------------------|--|--|
| <a href="#">JD-1725</a>  | Ch. 938                   | Notice to school board   | Notice to school board of the filing of a felony delinquency petition; adjudication of delinquency; school attendance as condition of a CHIPS, JIPS, or delinquency dispositional order; and other information required to be provided to the school board |
| <a href="#">JD-1738A</a> | Both                      | Request to inspect juvenile court records                      | Standardized form for requesting access to juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed  |
| <a href="#">JD-1738B</a> | Both                      | Order to inspect juvenile court records                        | Court order for the inspection of juvenile court records   |
| <a href="#">JD-1739A</a> | Both                      | Request and authorization to open court records for inspection | Standardized form for authorization by certain parties to access child or juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed                             |
| <a href="#">JD-1739B</a> | Both                      | Order to open court records for inspection                     | Court order to open court records for inspection   |

## Supplement Chapter 16

## Contempt and Juvenile Sanctions

Book sections supplemented: [16.1](#), [16.9](#), [16.23](#), and [16.27](#)

### 16.1 Scope of Chapter



[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024).

**16.9 [Juvenile Sanctions in Delinquency and JIPS Cases Under [Wis. Stat. § 938.13\(4\), \(6m\), \(7\), \(12\), and \(14\)\] \[Defenses\] Sanction to Secure Custody](#)**

[Page 8: Added textual sentence and citation to end of first paragraph in last Note in section](#)

**Note.** Wisconsin juvenile correctional placements were restructured by 2017 Wis. Act 185. The legislation required establishment of new Type 1 correctional facilities for serious juvenile offender placements as well as additional secured residential care centers for children and youth by the earlier of January 1, 2021, or the date that all juveniles are transferred from the Type 1 juvenile correctional facility at Copper Lake and Lincoln Hills Schools. Although 2019 Wis. Act 8 extended that deadline to July 1, 2021, the contemplated residential care centers are still not completed as of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, so attorneys should be alert to ongoing developments. *See* 2021 Wis. Act 252 (authorizing state to contract additional debt for the purpose of constructing new Type 1 juvenile correctional facility in Milwaukee County). Documentation on the Department of Corrections’ website estimates the first of these centers will be completed in 2026. *See* Wis. Dep’t of Corr., *Act 185 Overview—The Roadmap Forward*, <https://doc.wi.gov/Pages/AboutDOC/Act185.aspx#act185RoadmapFwd> (last visited Oct. 26, 2024).

**16.23 [Contempt] [Defenses] Consideration of Less Restrictive Alternatives**

[Page 14: Amended first sentence in second paragraph in section](#)

Indeed, in punitive contempt cases, defense counsel could argue that the fact-finder should decide the question of the availability of less restrictive alternatives, with the state having to prove beyond a reasonable doubt the unavailability of those alternatives. *See D.L.D.*, 110 Wis. 2d at 187. As the supreme court noted in *D.L.D.*, given the “severe nature of the contempt power,” a “complete exhaustion of alternatives” is required with “findings concerning each remedy’s relevancy and effectiveness.” *Id.*

**16.27 Standard Juvenile Court Forms**

[Page 16: Amended Name of Form and Purpose description for Form JD-1770 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose  |
|-------------|---------------------------|---|--|
| JD-1770     | Ch. 938                   | Short term detention—pending investigation/as a consequence/crisis intervention | Document authorizing custody hold of juvenile pending investigation of an alleged violation of a dispositional order, as a consequence for violation of a dispositional order, or if crisis intervention is required |

**Chapter 16**

---

**Contempt and Juvenile Sanctions**

---

**I. [Scope of Chapter](#)**

**[§ 16.1]**

This chapter discusses the uses of contempt under [Wis. Stat.](#) ch. 785 and the uses of juvenile sanctions under [Wis. Stat.](#) § 938.355(6) and (6m) to compel compliance with dispositional orders in cases involving children in need of protection or services (CHIPS), unborn children in need of protection or services (UCHIPS), juveniles in need of protection or services (JIPS), or delinquent juveniles.<sup>1</sup>

In the criminal justice system, if an adult fails to comply with the terms and conditions of probation, probation can be revoked and the adult ordered to serve a term of imprisonment. In the juvenile justice system, however, the court can commit a delinquent juvenile to a juvenile correctional facility or secured residential care center for children and youth only if the juvenile fits certain criteria. [Wis. Stat.](#) § 938.34(4m). Moreover, placement in a juvenile correctional facility or secured residential care center for children and youth is not a dispositional alternative for juveniles who are adjudicated in need of protection or services. See [Wis. Stat.](#) § 938.345(1)(a). Nonetheless, the court can order JIPS and delinquent juveniles committed to short terms in juvenile detention centers or county jails as a means of ensuring compliance with the terms of a dispositional order. See *infra* § 16.12.

## II. Juvenile Sanctions in Delinquency and JIPS Cases Under [Wis. Stat.](#) § 938.13(4), (6m), (7), (12), and (14) [§ 16.2]

### A. In General [§ 16.3]

Under [Wis. Stat.](#) § 938.355(6), the court may order any of the five statutorily defined sanctions as a consequence for any incident in which a juvenile who has been adjudicated delinquent has violated one or more conditions of the dispositional order.

**Note.** In *State v. Ellis H. (In the Interest of Ellis H.)*, 2004 WI App 123, 274 Wis. 2d 703, 684 N.W.2d 157, the court of appeals held that a sanction may be imposed for each incident rather than for each condition violation. In other words, the sanction is tied to the incident in which the dispositional order has been violated, regardless of the number of conditions that may have been violated. In *Ellis H.*, the juvenile violated multiple conditions (by running away, failing to meet with his social worker, and failing to attend community service) during what the court of appeals determined to be one incident. Therefore, the court held, only one sanction could be imposed for this one incident.

The court may impose the following sanctions under [Wis. Stat.](#) § 938.355(6)(d):

1. Placement in a juvenile detention facility or a place of nonsecure custody for up to 10 days, [Wis. Stat.](#) § 938.355(6)(d)1.;

**Note.** The Wisconsin Court of Appeals has addressed how to determine the final day of a maximum period of custody and interpreted the phrase “not more than 10 days.” *State v. A.A. (In the Int. of A.A.)*, 2020 WI App 11, ¶¶ 1, 6, [391 Wis. 2d 416](#), 941 N.W.2d 260. The term “days” in [Wis. Stat.](#) § 938.355(6)(d)1. means calendar days, and “any part of any unique calendar day spent in custody is essentially ‘rounded up’ to a ‘day’ of custody.” *Id.* ¶ 32.

**Note.** The federal Juvenile Justice and Delinquency Prevention Act (JJDPa) restricts the use of detention for status offenders, i.e., youth charged with offenses that would not be criminal offenses if committed by an adult (habitual truancy, ordinance violations, CHIPS, and JIPS), to no more than 7 days. 34 [U.S.C.](#) § 11133(a)(23)(C)(iii)(1)(dd). On May 19, 2020, the (Wisconsin) Governor’s Juvenile Justice Commission made several recommendations to comply with the JJDPa, explaining

Wisconsin is a participating state, under the JJDPa, and in order to maintain compliance and receive federal Title II Formula funds, it is necessary to determine if Wisconsin law is consistent with [JJDPa Deinstitutionalization of Status Offenders (DSO)] provisions, and if current court practices are consistent with the same.

The changes within the JJDPa impact Wisconsin law and practice. Wisconsin law currently allows juvenile court judges to detain some status offenders up to 10 days or longer for a violation of a valid court order. The federal DSO provision in the JJDPa restricts the use of detention for status offenders for more than 7 days in a juvenile detention facility for violation of a valid court order.

Letter from Jennifer Ginsburg, Chair, Governor’s Juv. Just. Comm’n, to Gov. Tony Evers (May 19, 2020), <https://gjcc.wisconsin.gov/resources> (choose “Policy Recommendations”; then follow “Deinstitutionalization of Status Offenders (DSO) Recommendations to the Governor (May 2020)” hyperlink).

**Note.** If there is no juvenile detention facility in the county, the court can order the juvenile committed to the juvenile portion of the county jail, but only if the jail meets the standards promulgated by rule by the Department of Corrections. [Wis. Stat.](#) § 938.355(6)(d)1. [Wis. Stat.](#) § 938.355(6)(cm) states that the court cannot place a juvenile in a place of nonsecure custody as a sanction unless the court finds that the agency primarily responsible for providing services for the juvenile has made reasonable efforts to prevent the removal of the juvenile from his or her home and that continued placement in the home conflicts with the juvenile’s welfare. Such findings must be made on a case-by-case basis based on circumstances specific to the juvenile. The court must document or refer to the specific information on which the findings are based in the sanction order. [Wis. Stat.](#) § 938.355(6)(cm). The juvenile must be provided educational services “consistent with his or her current course of study during the period of placement.” [Wis. Stat.](#) § 938.355(6)(d)1.

2. Suspension of or limitation on the use of the juvenile's driving privilege or hunting or fishing license for up to three years, [Wis. Stat. § 938.355\(6\)\(d\)2.](#);

**Note.** If the juvenile does not possess a valid driver's license on the date of the sanction hearing, the court may order the suspension to begin on the date on which the juvenile is first eligible for the issuance or reinstatement of a driver's license.

3. Home detention for up to 30 days, with or without an electronic monitor, [Wis. Stat. § 938.355\(6\)\(d\)3.](#);
4. Uncompensated community service work for up to 25 hours, [Wis. Stat. § 938.355\(6\)\(d\)4.](#); and
5. Participation in the programming of a youth report center, [Wis. Stat. § 938.355\(6\)\(d\)5.](#)

The court can impose on a JIPS juvenile, other than a JIPS juvenile who has been found to be a habitual truant under [Wis. Stat. § 938.13\(6\)](#), any of the above sanctions except for placement in a juvenile detention facility or in the juvenile portion of a county jail. [Wis. Stat. § 938.355\(6\)\(a\)](#). [Wis. Stat. § 938.355\(6m\)](#) specifies the sanctions available in JIPS habitual truancy cases. *See infra* [§ 16.11](#).

**Caution.** If the juvenile is an *Indian juvenile* as defined in [Wis. Stat. § 938.02\(8g\)](#), the court may not order ... removal of the child from the home ... [as a sanction] unless the court finds by clear and convincing evidence, including the testimony of one or more qualified experts, that continued custody of the Indian juvenile by the parent or Indian custodian is likely to result in serious emotional or physical damage to the juvenile under [[Wis. Stat. §](#)] 938.028(4)(d)1. and the court finds that active efforts under [[Wis. Stat. §](#)] 938.028(4)(d)2. have been made to prevent the breakup of the Indian juvenile's family and that those efforts have been unsuccessful. [Wis. Stat. § 938.355\(6\)\(cr\)](#). These findings are in addition to the typical reasonable efforts finding required under [Wis. Stat. § 938.355\(6\)\(cm\)](#), described in this section, *supra*. The qualified expert is something more than the typical county-assigned social worker. *See Wis. Stat. § 938.028(2)(d)*; *Monroe Cnty. Dep't of Hum. Servs. v. Luis R. (In re Termination of Parental Rts. to Vaughn R.)*, 2009 WI App 109, ¶ 2, 320 Wis. 2d 652, 770 N.W.2d 795. In *Luis R.*, a termination of parental rights (TPR) case, the court held that a typical social worker was not a qualified expert under the federal Indian Child Welfare Act and that the above findings are required regardless of whether the child has been placed out of the home since before the TPR petition was filed. *Id.*

## B. Procedure [§ 16.4]

The person or agency primarily responsible for providing dispositional services, the prosecutor, or the court that entered the dispositional order can file a motion for imposition of a sanction. [Wis. Stat. § 938.355\(6\)\(b\)](#). The court that initiates the sanctions motion is disqualified from holding the sanctions hearing. *Id.*

A court can consider a motion for sanctions only if one of the following occurred:

1. At the dispositional hearing, the court explained to the juvenile
  - a. The conditions of the dispositional order, and
  - b. Possible sanctions under [Wis. Stat. § 938.355\(6\)\(d\)](#) for failure to comply with the conditions; or
2. Before the alleged violation, the juvenile acknowledged in writing
  - a. That the juvenile had read (or had someone else read to him or her) the conditions of the dispositional order and the possible sanctions, and
  - b. That the juvenile understood both the conditions and the possible sanctions.

[Wis. Stat. § 938.355\(6\)\(a\)](#).

[Wis. Stat. § 938.355\(6\)\(a\)](#) requires that a juvenile court ensure that the juvenile has the ability to understand the conditions of the dispositional order and the potential sanctions, whether the juvenile is informed of them at the dispositional hearing or at a later time. *State v. Eugene W. (In the Int. of Eugene W.)*, 2002 WI App 54, ¶ 3, 251 Wis. 2d 259, 641 N.W.2d 467. Once the issue of the juvenile's ability to understand the conditions and sanctions is raised, the burden shifts to the state to establish, by clear and convincing evidence, that the juvenile is capable of understanding the court's warnings. *Id.*

Notice of the motion for sanctions must be given to the juvenile, the guardian ad litem, adversary counsel, the parent, guardian, or legal custodian, and all parties present at the original dispositional hearing. [Wis. Stat. § 938.355\(6\)\(b\)](#).

Under [Wis. Stat. § 938.355\(6\)\(c\)](#), the juvenile has a right to a hearing. [Wis. Stat. § 938.355\(6\)\(c\)](#) also provides that at that hearing, the juvenile has the right to representation by legal counsel and the right to present evidence. In addition to these statutory rights, the juvenile subject to a sanction hearing has constitutional rights. Under the Due Process Clause, the juvenile has the right to those procedural-due-process rights afforded adults facing revocation of probation or parole. [State v. B.S. \(In the Int. of B.S.\)](#), 162 Wis. 2d 378, 398, 469 N.W.2d 860 (Ct. App. 1991); see [Morrissey v. Brewer](#), 408 U.S. 471, 488–89 (1972) (identifying the procedural-due-process rights). These rights are as follows:

1. Written notice of the alleged violations;
2. Disclosure of the evidence against him or her;
3. The opportunity to present a defense;
4. The right to cross-examine and confront adverse witnesses;
5. A neutral and detached hearing body; and
6. A statement of the facts on which the judge relied in ordering sanctions, including the reasons for imposing sanctions.

*B.S.*, 162 Wis. 2d at 401.

A juvenile also has the right to remain silent during sanction proceedings. *Id.* at 404. The court of appeals held that the right to remain silent derives from [In re Gault](#), 387 U.S. 1, 55 (1967).

Because the rules of evidence do not apply at dispositional hearings, [Wis. Stat. § 938.299\(4\)\(b\)](#), the rules also do not apply at sanction hearings.

Similar to other hearings conducted under [Wis. Stat. ch. 938](#), sanction hearings may be conducted via telephone or live audiovisual means under [Wis. Stat. § 938.299\(5\)\(a\)](#), subject to an objection by one of the parties. [Wis. Stat. § 938.299\(5\)\(b\)](#).

The use of restraints on a juvenile is prohibited during a court proceeding, including sanction hearings, subject to the exceptions outlined in [Wis. Stat. § 928.299\(2m\)](#).

## C. Defenses [§ 16.5]

### 1. Notice [§ 16.6]

For a court to impose sanctions on a juvenile, either the judge at the dispositional hearing must have explained to the juvenile the conditions of the dispositional order and the possible sanctions for violating the order, or the juvenile must have acknowledged in writing, before the violation, that he or she had read the conditions and the possible sanctions and that the juvenile understood the conditions and sanctions. [Wis. Stat. § 938.355\(6\)\(a\)](#). The juvenile must have the ability to understand the conditions of the dispositional order and possible sanctions. If the juvenile's ability to understand the conditions and sanctions is raised, the state must prove that the juvenile is capable of understanding the court's warnings. See [State v. Eugene W. \(In the Int. of Eugene W.\)](#), 2002 WI App 54, ¶ 3, 251 Wis. 2d 259, 641 N.W.2d 467. The dispositional order itself must contain a statement of the conditions with which the juvenile must comply. [Wis. Stat. § 938.355\(2\)\(b\)7](#).

**Practice Tip.** When faced with defending against a sanction motion, counsel should investigate whether the juvenile received proper notice of the conditions and possible sanctions. Either the court record must demonstrate that the judge explained to the juvenile the conditions with which the juvenile must comply as well as the possible consequences should the juvenile fail to comply, or something in writing must indicate that the juvenile had read (or had read to him or her) the conditions and sanctions and that the juvenile understood those conditions and sanctions. If counsel finds a deficient record, and if no written acknowledgment exists, then defense counsel can argue that the notice does not satisfy the statutory requirements, that sanctions therefore cannot be sought, and that the court must dismiss the motion for sanctions.

## 2. Reasonableness of Conditions [§ 16.7]

If the dispositional order contains conditions that are unreasonable or impossible for the juvenile to meet, defense counsel can argue that the court should not sanction the juvenile for noncompliance with the conditions.

Conditions may be imposed when the juvenile dispositional order includes supervision. As noted in [chapter 11, \*supra\*](#), when the judge places a delinquent juvenile on supervision, the judge can order conditions that include reasonable rules for the juvenile's conduct. [Wis. Stat. § 938.34\(2\)](#). [Wis. Stat. § 938.345\(1\)](#) permits the court to impose conditions that include reasonable rules for the juvenile's conduct in JIPS cases as well. Reasonable rules are those designed for the physical, mental, and moral well-being and behavior of the juvenile. [Wis. Stat. § 938.34\(2\)](#). For example, the supreme court has held that because restitution promotes the moral well-being and behavior of the juvenile, the court can order a delinquent juvenile to pay restitution for offenses dismissed and read in, even though the statutes do not specifically provide for that dispositional alternative. [R.W.S. v. State \(In the Int. of R.W.S.\)](#), 162 Wis. 2d 862, 873, 471 N.W.2d 16 (1991).

The reasonableness of a condition of probation in a criminal case depends on whether the condition serves to effectuate the objectives of probation. [State v. Heyn](#), 155 Wis. 2d 621, 629, 456 N.W.2d 157 (1990). In adult criminal cases, the dual objectives of probation consist of rehabilitating the defendant and protecting the state and community interest. *Id.* In delinquency cases, the “moral well-being and behavior of the child” serve as the focus of supervision. [R.W.S.](#), 162 Wis. 2d at 873. Just as a condition of probation must “fairly relate” to the offense, so must a rule of supervision fairly relate to the juvenile or the adjudicated offense. As the court noted in [Heyn](#), “a condition of probation which requires the convicted person to pay out funds as a consequence of his or her criminal activity must be fairly related to the damage caused by the offender and to his or her ability to pay.” [Heyn](#), 155 Wis. 2d at 629. Indeed, some of the dispositional alternatives under [Wis. Stat. § 938.34](#) explicitly depend on a condition, such as [Wis. Stat. § 938.34\(14m\)](#), which allows the court to restrict or suspend a juvenile's driving privileges, but only if the juvenile has been adjudicated delinquent for a crime involving a motor vehicle. Of course, a condition cannot qualify as reasonable if it is impossible for the juvenile to satisfy. In [Huggett v. State](#), 83 Wis. 2d 790, 799–800, 266 N.W.2d 403 (1978), the supreme court noted that “conditioning probation on the satisfaction of requirements which are beyond the probationer's control undermines the probationer's sense of responsibility.” See also [Sweeney v. United States](#), 353 F.2d 10 (7th Cir. 1965) (holding that probation conditions impossible to meet are unreasonable).

## 3. Proof of Violation [§ 16.8]

Although the rules of evidence do not apply at sanction hearings, the court must “apply the basic principles of relevancy, materiality and probative value” in deciding whether to admit evidence on questions of fact. [Wis. Stat. § 938.299\(4\)\(b\)](#). Thus, the court must exclude any irrelevant evidence, see [Wis. Stat. § 904.02](#), evidence that has more prejudicial impact than probative value, see [Wis. Stat. § 904.03](#), repetitious evidence, see *id.*, and evidence otherwise inadmissible under [Wis. Stat. § 901.05](#) (governing admissibility of HIV test results). [Wis. Stat. § 938.299\(4\)\(b\)](#). The court must exclude hearsay evidence that does not have “demonstrable circumstantial guarantees of trustworthiness.” *Id.* Therefore, when assessing the state's evidence, defense counsel should pay particular attention to the rules governing relevancy and reliability and should prepare to make the appropriate objections.

[Wis. Stat. § 938.355\(6\)\(d\)](#) specifies that the court can sanction a juvenile only if the court finds by a preponderance of the evidence that the juvenile violated a condition of his or her dispositional order.

## 4. Sanction to Secure Custody [§ 16.9]

Under the former Children's Code, delinquency dispositions had to “employ those means necessary to maintain and protect the child's well-being” that proved the “least restrictive of the rights of the parent or child.” See [Wis. Stat. § 48.355\(1\)](#) (1993–94). Accordingly, under the former Children's Code, the court could impose only the least restrictive sanction.

Under the Juvenile Justice Code, delinquency dispositions need not employ the least restrictive means. Therefore, defense counsel might not succeed in arguing that the court should impose the least restrictive sanction. Despite the omission of “least restrictive” from the delinquency-related provisions of the current Juvenile Justice Code, however, grounds may exist for arguing that the requirements under [Wis. Stat. §§ 938.208 and 938.209](#) must be met before the court can sanction a juvenile to secure custody.

In [Wis. Stat. §§ 938.208 and 938.209](#), the Juvenile Justice Code lays out the criteria for holding a juvenile in a juvenile detention facility or in a county jail. See *supra* [ch. 5](#). Under [Wis. Stat. § 938.208](#), the intake worker cannot order a juvenile held in a juvenile detention facility unless probable cause exists to believe that the juvenile has committed a delinquent act and presents a substantial risk either of physical



harm to another or of running away. [Wis. Stat.](#) § 938.208(1). Under this section, for those juveniles who have been adjudged delinquent, the delinquent act can consist of the act for which the court adjudged the juvenile delinquent. *Id.* Under [Wis. Stat.](#) § 938.209, an intake worker can order secure custody in a county jail only if the juvenile meets the criteria of [Wis. Stat.](#) § 938.208, the jail meets the physical requirements of [Wis. Stat.](#) § 938.209(1)(a), and one of two additional factors exist: (1) no other juvenile detention facility is available, or (2) the juvenile presents a substantial risk of physical harm to others in the juvenile detention facility, evidenced by a previous act or attempt, and this risk can be avoided only by transferring the juvenile to the jail. Under [Wis. Stat.](#) § 938.209(1)(a), the jail must meet the standards established by the Department of Corrections, the juvenile must be held in a room separated from the adults but not in a cell designed for segregation of adults, the facility must provide adequate supervision, and the court must review the juvenile's status every three days. [Wis. Stat.](#) § 938.209(1)(a)1.–5.

The court can order a juvenile committed to a juvenile correctional facility or secured residential care center for children and youth only if the evidence demonstrates that the juvenile poses a danger to the public and that the juvenile needs restrictive custodial treatment. [Wis. Stat.](#) § 938.34(4m); *see also supra* [ch. 11](#).

**Note.** The supreme court has held that danger to the public means “exposes the public to harm, injury, pain or loss.” *B.M. v. State (In the Int. of B.M.)*, 101 Wis. 2d 12, 18, 303 N.W.2d 601 (1981). Thus, a juvenile can be found to pose a danger to the public if the juvenile presents an actual or potential threat to the *property* of another. *Id.* The supreme court concluded that the legislature did not intend to limit the meaning of “danger to the public” to juveniles threatening physical violence or injury. *Id.*

**Note.** Wisconsin juvenile correctional placements were restructured by 2017 Wis. Act 185. The legislation required establishment of new Type 1 correctional facilities for serious juvenile offender placements as well as additional secured residential care centers for children and youth by the earlier of January 1, 2021, or the date that all juveniles are transferred from the Type 1 juvenile correctional facility at Copper Lake and Lincoln Hills Schools. Although 2019 Wis. Act 8 extended that deadline to July 1, 2021, the contemplated residential care centers are still not completed as of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, so attorneys should be alert to ongoing developments. *See* 2021 Wis. Act 252 (authorizing state to contract additional debt for the purpose of constructing new Type 1 juvenile correctional facility in Milwaukee County).

2017 Wis. Act 185 provides funding for additional secured residential care centers for children and youth, which will be operated by counties through contracts with the state. Despite the changes to the actual structure of available juvenile correctional placements, courts still must make the same findings for placement in these facilities as for other placements under [Wis. Stat.](#) § 938.34(4m).

Not all delinquent acts demonstrate danger to the public. For example, in an unpublished decision, the court of appeals found the evidence insufficient to prove dangerousness in a case in which the child was convicted of obstructing an officer, *see* [Wis. Stat.](#) § 946.41, and her prior contacts had been “limited to such activities as truancy, running away, possession of alcohol and curfew violations.” *State v. L.L.C. (In the Int. of L.L.C.)*, No. 91-1646-FT, 1991 WL 285924 (Wis. Ct. App. Nov. 7, 1991) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)); *see also* *J.R. v. State (In the Int. of J.R.)*, No. 82-2428, 1983 WL 161556 (Wis. Ct. App. July 26, 1983) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (holding charge of obstructing an officer insufficient to prove dangerousness).

**Practice Tip.** Citing the *in pari materia* doctrine, defense counsel can thus argue that the court can commit a juvenile to a juvenile detention facility or county jail as a sanction for noncompliance with the dispositional order only if the criteria for secure custody under [Wis. Stat.](#) §§ 938.208 and 938.209 or for commitment to a juvenile correctional facility or secured residential care center for children and youth under [Wis. Stat.](#) § 938.34(4m) have been met. *In pari materia* is a rule of statutory construction that provides that sections of a statute relating to the same subject matter must be read together. *R.H.L. v. State (In the Int. of R.H.L.)*, 159 Wis. 2d 653, 659, 464 N.W.2d 848 (Ct. App. 1990). The court must consider the entire section and related sections. *R.W.S. v. State (In the Int. of R.W.S.)*, 162 Wis. 2d 862, 871, 471 N.W.2d 16 (1991). Because [Wis. Stat.](#) § 938.355(6) does not provide criteria for each increasingly more restrictive sanction, the *in pari materia* doctrine makes it appropriate to read in the criteria for secure custody found elsewhere in the Juvenile Justice Code.

## 5. Double Jeopardy [§ 16.10]

Sometimes the request for sanctions rests on a claim that the juvenile committed a new delinquent act. Under these circumstances, the district attorney can file a motion for sanctions as well as a new delinquency petition based on the same act. In one unpublished decision, the court of appeals held that double jeopardy prohibits imposing sanctions for the same act for which the juvenile has been adjudged delinquent and for which a dispositional order has been entered. *Josh M.S. v. State (In the Int. of Josh M.S.)*, No. 92-1171-FT, 1992 WL 355123 (Wis. Ct. App. Sept. 1, 1992) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The rationale of that decision might prove instructive to defense counsel faced with the same situation.



The constitutional protection against double jeopardy applies in juvenile delinquency proceedings. *Breed v. Jones*, 421 U.S. 519, 531–32 (1975). The Double Jeopardy Clause protects individuals against multiple punishments for the same crime. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Double Jeopardy Clause also protects individuals from second prosecutions for the same offense. Therefore, a juvenile subjected to *punishment* for new delinquent conduct, both through a delinquency adjudication and a sanction order, might be able to argue that the juvenile was being impermissibly punished twice for the same crime.

The court of appeals has acknowledged that the Double Jeopardy Clause might apply if a juvenile court improperly applies the sanction statute, resulting in “an unconstitutional imposition of punishment.” *State v. B.S. (In the Int. of B.S.)*, 162 Wis. 2d 378, 396, 469 N.W.2d 860 (Ct. App. 1991). (“We have no doubt but that a juvenile judge can misuse secure detention (or any other sanction) by applying it so unreasonably as to convert it to punishment.”). *But see State v. Killebrew*, 115 Wis. 2d 243, 340 N.W.2d 470 (1983) (holding that prison disciplinary action followed by criminal prosecution for same incident—battery—did not violate Double Jeopardy Clause because punishment was not main purpose of prison disciplinary action against defendant); *Craig S.G. v. State (In the Int. of Craig S.G.)*, 209 Wis. 2d 65, 561 N.W.2d 807 (Ct. App. 1997) (holding that Double Jeopardy Clause was not violated when juvenile faced both waiver to adult court and sanction for same conduct; juvenile was not subjected to risk of successive punishments by waiver because he was able to purge sanction); *State v. Fonder*, 162 Wis. 2d 591, 469 N.W.2d 922 (Ct. App. 1991) (holding that double jeopardy did not apply when prisoner was punished for escape and, because of the escape, also faced disciplinary action in prison).

### III. Sanctions for JIPS Cases Under [Wis. Stat. § 938.13\(6\): Habitual Truants \[§ 16.11\]](#)

Under the Juvenile Justice Code, the court can sanction juveniles who have been adjudged JIPS based on habitual truancy from school. See [Wis. Stat. §§ 938.13\(6\), 938.355\(6m\)](#). The sanction motion can originate with the person or agency responsible for providing services to the juvenile, the prosecutor, or the court that entered the dispositional order. [Wis. Stat. § 938.355\(6m\)\(b\)](#). If the court initiates the motion, that court must disqualify itself from holding the hearing on the motion. *Id.*

Notice of the motion must be provided to the juvenile, the guardian ad litem, adversary counsel, the parent, guardian, or legal custodian, and all parties present at the original dispositional hearing. *Id.* Within 15 days after the filing of the motion, the court must hold a hearing at which the juvenile has the right to be represented by counsel and to present evidence. [Wis. Stat. § 938.355\(6m\)\(c\)](#).

At the hearing, if the court finds by a preponderance of the evidence that the juvenile violated a condition of the dispositional order, the court can order as a sanction any of the following:

1. Placement in secure or nonsecure custody for no more than 10 days, [Wis. Stat. § 938.355\(6m\)\(a\)1g](#);

**Note.** [Wis. Stat. § 938.355\(6m\)\(cm\)](#) states that the court cannot place a juvenile in a place of nonsecure custody as a sanction unless the court finds that the agency primarily responsible for providing services for the juvenile has made reasonable efforts to prevent the removal of the juvenile from his or her home and that continued placement in the home conflicts with the juvenile’s welfare. Since findings must be made on a case-by-case basis based on circumstances specific to the juvenile, the court, in the sanction order, must document or refer to the specific information on which the findings are based. The use of secure custody as a sanction must first be approved by the county board. [Wis. Stat. § 938.355\(6m\)\(a\)1g](#).

2. Suspension or limitation of the juvenile’s driving privilege or hunting or fishing license for no more than one year, [Wis. Stat. § 938.355\(6m\)\(a\)1m](#);

**Note.** If the juvenile does not possess a valid driver’s license on the date of the sanction hearing, the court may order the suspension to begin on the date on which the juvenile is first eligible for the issuance or reinstatement of a driver’s license. *Id.*

3. Counseling or up to 25 hours of community service, [Wis. Stat. § 938.355\(6m\)\(a\)2](#);
4. Detention in the juvenile’s home for not more than 30 days, [Wis. Stat. § 938.355\(6m\)\(a\)3](#). (providing that order may allow juvenile to leave home if accompanied by a parent or guardian); or
5. Participation in a youth report center program, [Wis. Stat. § 938.355\(6m\)\(a\)4](#).

In addition, the court can also order as a sanction any of the dispositions specified in [Wis. Stat. § 938.342\(1g\)\(d\)–\(j\)](#) and (1m), regardless of whether the court has already imposed the disposition in the order violated by the juvenile. [Wis. Stat. § 938.355\(6m\)\(a\)](#). Dispositions under [Wis. Stat. § 938.342](#) include attending school, payment of a forfeiture, curfew, educational programming, revocation of the juvenile’s work permit, participation in teen court, formal or informal supervision, and counseling for the juvenile’s parent or guardian.

The court can impose sanctions only if the court explained to the juvenile at the dispositional hearing the conditions with which the juvenile must comply and the possible sanctions, or if, before the violation, the juvenile acknowledged in writing that he or she had read the conditions and possible sanctions (or the conditions and possible sanctions were read to him or her) and that the juvenile understood those conditions and sanctions. [Wis. Stat.](#) § 938.355(6m)(a). The juvenile must have the ability to understand the conditions of the dispositional order and possible sanctions. If the juvenile's ability to understand the conditions and sanctions is raised, the state must prove that the juvenile is capable of understanding the court's warnings. See *State v. Eugene W. (In the Int. of Eugene W.)*, 2002 WI App 54, ¶ 3, 251 Wis. 2d 259, 641 N.W.2d 467.

**Caution.** If the juvenile is an *Indian juvenile* as defined in [Wis. Stat.](#) § 938.02(8g), the court may not order the sanction of removal from the home of the Indian juvenile's parent or Indian custodian and placement in a place of nonsecure custody specified in par. (a)1g., unless the court finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses, that continued custody of the Indian juvenile by the parent or Indian custodian is likely to result in serious emotional or physical damage to the juvenile under [\[Wis. Stat. § 938.028\(4\)\(d\)1.](#) and the court finds that active efforts under [\[Wis. Stat. § 938.028\(4\)\(d\)2.](#) have been made to prevent the breakup of the Indian juvenile's family and that those efforts have proved unsuccessful. [Wis. Stat.](#) § 938.355(6m)(cr). These findings are in addition to the typical reasonable-efforts finding required under [Wis. Stat.](#) § 938.355(6m)(cm), described in this section, *supra*.

#### IV. Short-Term Detention for Violation of Delinquency Order, Aftercare Supervision, or JIPS Order [§ 16.12]

Under the Juvenile Justice Code, if a delinquent juvenile violates a condition of his or her dispositional order or aftercare supervision, the juvenile's caseworker can, without a hearing, place the juvenile in secure custody or nonsecure custody for not more than 72 hours while an investigation of the alleged violation takes place or as a consequence of that violation. [Wis. Stat.](#) § 938.355(6d)(a), (b). The use of juvenile detention as short-term detention must be approved by the county board. [Wis. Stat.](#) § 938.355(6d)(e).

Short-term detention can also serve as a sanction for juveniles adjudged JIPS under [Wis. Stat.](#) § 938.13. However, a caseworker can place a JIPS juvenile only in a place of nonsecure custody. [Wis. Stat.](#) § 938.355(6d)(c).

Like the other sanctions available under [Wis. Stat.](#) § 938.355(6), this short-term detention can apply only if the juvenile receives notice of the conditions that the juvenile must follow and of the possible sanctions. Thus, before a caseworker can use short-term detention as a sanction or to investigate an alleged violation of a condition, either (1) the court must have explained to the juvenile at the dispositional hearing the conditions by which the juvenile must abide and the possibility of short-term detention for a violation of those conditions, or (2) the juvenile must have acknowledged in writing that he or she had read the conditions (or the conditions were read to him or her) and understood them and the possibility of short-term detention. See [Wis. Stat.](#) § 938.355(6d)(a), (b), (c).

When short-term detention is used as a consequence for a violation, the juvenile may make a statement concerning the possible placement and the juvenile's alleged conduct. [Wis. Stat.](#) § 938.355(6d)(a)2., (b)2., (c)2. The statement must be reviewed by the court's or county department's designee, who then approves the placement, modifies the terms of the placement, or orders the juvenile to be released from custody. *Id.*

If a juvenile is held longer than 72 hours, the court must hold either a sanction hearing under [Wis. Stat.](#) § 938.355(6)(c), *see supra* § 16.4, or a detention hearing under [Wis. Stat.](#) § 938.21. See [chapter 5, supra](#), for a discussion of detention hearings. If the court holds a detention hearing under [Wis. Stat.](#) § 938.21, the court must hold the hearing within 72 hours, rather than 24 hours, after the time of making the decision to hold the juvenile in custody. A written statement of the reasons for continuing to hold the juvenile in custody can be filed instead of a petition under [Wis. Stat.](#) § 938.25. [Wis. Stat.](#) § 938.355(6d)(d).

#### V. Contempt [§ 16.13]

##### A. In General [§ 16.14]

Courts have available both inherent authority and statutory power of contempt as means of maintaining decorum and ensuring the implementation of their orders. *D.L.D. v. Circuit Ct. for Crawford Cnty.*, 110 Wis. 2d 168, 178, 327 N.W.2d 682 (1983). In juvenile cases, the court sometimes uses contempt to compel compliance with a dispositional order or to punish noncompliance.

[Wis. Stat.](#) § 938.355(6g) and [Wis. Stat.](#) ch. 785 govern the use of contempt in juvenile cases. *B.L.P. v. Circuit Ct. for Racine Cnty. (In re Contempt Finding Against B.L.P.)*, 118 Wis. 2d 33, 345 N.W.2d 510 (Ct. App. 1984); *see also* 70 Wis. Op. Att'y Gen. 98, 107 (1981). [Wis. Stat.](#) § 938.355(6g) restricts a juvenile court's authority to find a juvenile in contempt under [Wis. Stat.](#) ch. 785. *State v. Aaron D. (In the Int.*

of *Aaron D.*, 214 Wis. 2d 56, 571 N.W.2d 399 (Ct. App. 1997). Under the Juvenile Justice Code, a juvenile can only be charged with contempt of court, as defined in [Wis. Stat. § 785.01](#), after committing a second or subsequent violation of a condition specified in the dispositional order. *Id.*; see also *infra* § 16.16.

## B. To Compel Compliance with Dispositional Order [§ 16.15]

### 1. For Continued Violation of Order [§ 16.16]

Under the Juvenile Justice Code, if a delinquent or JIPS juvenile commits a second or subsequent violation of his or her dispositional order after the court has sanctioned him or her under [Wis. Stat. § 938.355\(6\)\(a\)](#) or (6m), the district attorney can file a delinquency petition alleging contempt of court, as defined in [Wis. Stat. § 785.01\(1\)](#). [Wis. Stat. § 938.355\(6g\)\(a\)](#); see [Wis. Stat. § 938.12](#); see also *supra* [ch. 7](#) (filing of petition). [Wis. Stat. § 785.01\(1\)](#) defines *contempt of court* as intentional misconduct in the presence of the court that interferes with a court proceeding; intentional disobedience, resistance, or obstruction of a court order; intentional refusal as a witness to appear, be sworn, or answer a question; or intentional refusal to produce a record, document, or other object. The delinquency petition must recite the disposition that the district attorney seeks. [Wis. Stat. § 938.355\(6g\)\(a\)](#).

The district attorney can file the petition on his or her own initiative or at the request of the court that either imposed the condition of the dispositional order or imposed the previous sanction. If the district attorney files the petition at the court's request, the court must disqualify itself from holding any hearing on the contempt petition. *Id.*

The court can find the juvenile in contempt of court and order a disposition under [Wis. Stat. § 938.34](#) only if the court makes *all* the following findings:

1. The juvenile has a previous sanction for violating a condition of his or her dispositional order and, after that sanction, committed another violation of the dispositional order. [Wis. Stat. § 938.355\(6g\)\(b\)1](#).
2. At the sanction hearing, the court explained to the juvenile the conditions of the dispositional order and informed the juvenile of a possible finding of contempt for a violation of the order and informed the juvenile of the possible consequences of that contempt. [Wis. Stat. § 938.355\(6g\)\(b\)2](#).
3. The violation is egregious. [Wis. Stat. § 938.355\(6g\)\(b\)3](#).
4. The court has considered less restrictive alternatives and found them ineffective. [Wis. Stat. § 938.355\(6g\)\(b\)4](#).

### 2. Under [Wis. Stat. Ch. 785](#) [§ 16.17]

#### a. In General [§ 16.18]

The supreme court has placed limitations on prosecutors' use of contempt actions under [Wis. Stat. ch. 785](#) to enforce dispositional orders. The child must receive sufficient notice to comply with the order and must understand its provisions. *D.L.D. v. Circuit Ct. for Crawford Cnty.*, 110 Wis. 2d 168, 187, 327 N.W.2d 682 (1983). The violation of the order must be "egregious." *Id.* The court must find incarceration to be the least restrictive alternative. *Id.* The special confinement requirements of [Wis. Stat. chs. 48 and 938](#) (i.e., the criteria governing placement in secure custody and in county jails) must have been met. *Id.*; see [Wis. Stat. §§ 48.209, 938.209](#); see also *supra* [ch. 5](#) (physical custody). [Wis. Stat. §§ 48.205, 48.208, 48.209, 938.205, 938.208, and 938.209](#) govern placement of children in juvenile detention or in the county jail.

The use of remedial contempt requires a "purge" or performance of the court-ordered act. A court has the authority to grant purge conditions that allow contemnors to purge their contempt by means other than complying with the court order that led to the contempt. *Larsen v. Larsen*, 165 Wis. 2d 679, 685, 478 N.W.2d 18 (1992). In truancy cases, the purge can include a requirement that the child attend school regularly. A child found in contempt for failing to attend school would have to be given the opportunity to attend school regularly for a specified period—that is, the child would have to have the opportunity to purge before the court sanctioning the child. If the child fails to purge, the court must hold another hearing before ordering the child placed in secure detention. At that hearing, the court must consider the best interests of the child. *D.L.D.*, 110 Wis. 2d at 183 (citing 70 Wis. Op. Att'y Gen. 98, 107–08 (1981)).

The court can also use contempt when parents fail to comply with the conditions of a dispositional order. [Wis. Stat. §§ 48.45\(2\), 938.45\(2\)](#); see also *supra* [ch. 4](#) (discussion of juvenile court's jurisdiction to enter orders affecting adults). Contempt is usually not the

option chosen by the court in such situations. Instead, a parent who fails to comply with the terms of a dispositional order might ultimately lose physical custody of the child or face a delay in the return of a child who has been placed outside the home.

**Comment.** The court of appeals reversed a contempt order based on the parent's failure to complete inpatient treatment, holding that by ordering commitment without applying the dangerousness standards and without following the procedures articulated by the U.S. Supreme Court for involuntary commitment, the juvenile court violated the parent's due-process rights. *C.S. v. Racine Cnty. (In re Finding of Contempt In the Int. of J.S.)*, 137 Wis. 2d 217, 404 N.W.2d 79 (Ct. App. 1987). The court of appeals noted that although the juvenile court has power to enter orders regulating the conduct of a parent in the parent's relationship to the child, the parent's failure to obtain the necessary treatment for her illness did not justify jail as the appropriate sanction. *Id.* at 225.

## b. Types of Contempt Under [Wis. Stat. Ch. 785](#) [§ 16.19]

A court can impose two types of sanctions for contempt of court: remedial and punitive. Remedial sanctions terminate continuing contempt. [Wis. Stat. § 785.01\(3\)](#); *D.L.D. v. Circuit Ct. for Crawford Cnty.*, 110 Wis. 2d 168, 179, 327 N.W.2d 682 (1983). Imprisonment can serve as a remedial sanction only if the individual has the opportunity to purge the contempt (i.e., to perform the act required by the court). *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990). Remedial contempt qualifies as a civil sanction because contemnors "hold the keys to their own jails." *State v. King*, 82 Wis. 2d 124, 137, 262 N.W.2d 80 (1978). In other words, the contemnor can end the term of punishment at any time by doing what the individual previously refused to do. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911).

A punitive sanction punishes someone for past contempt. [Wis. Stat. § 785.01\(2\)](#); *D.L.D.*, 110 Wis. 2d at 179. Imprisonment ordered as a punitive sanction runs for a determinate period, *King*, 82 Wis. 2d at 130, and the contemnor cannot purge himself or herself of the sanction. The type of contempt involved in a particular case determines the procedure and the due-process protections that apply. *Id.* at 131.

## c. Procedure for Remedial Contempt [§ 16.20]

A person aggrieved by another person's contempt of court can seek imposition of a remedial sanction by filing a motion for that purpose. See [Wis. Stat. § 785.03\(1\)\(a\)](#). The court of appeals has noted that the statute contemplates someone other than the circuit court as the aggrieved party. *B.L.P. v. Circuit Ct. for Racine Cnty. (In re Contempt Finding Against B.L.P.)*, 118 Wis. 2d 33, 44, 345 N.W.2d 510 (Ct. App. 1984). Before imposing a sanction, the court must give notice to the alleged contemnor and provide a full and fair hearing. *Id.* at 42. The court also must give the contemnor the opportunity to purge the contempt order by complying with certain conditions in the order. *Id.*

## d. Procedure for Punitive Contempt [§ 16.21]

Although a court has available both summary and nonsummary punitive contempt, a court uses summary contempt only in limited circumstances "to deal summarily with contempts committed in the actual presence of the court." *Gower v. Circuit Ct.*, 154 Wis. 2d 1, 10, 452 N.W.2d 354 (1990) (holding use of summary contempt procedure is improper to sanction attorney's tardiness).

A juvenile court can use the summary procedure only if the contempt occurs in the court's presence, *B.L.P. v. Circuit Ct. for Racine Cnty. (In re Contempt Finding Against B.L.P.)*, 118 Wis. 2d 33, 41, 345 N.W.2d 510 (Ct. App. 1984); see also [Wis. Stat. § 785.03\(2\)](#). Therefore, the court cannot use summary contempt to punish a child's failure to comply with a dispositional order. *B.L.P.*, 118 Wis. 2d at 41.

Summary contempt procedure does not afford the procedural safeguards normally accorded in criminal prosecutions. *Gower*, 154 Wis. 2d at 10. Nonsummary punitive contempt, however, requires that the district attorney file a criminal complaint. [Wis. Stat. § 785.03\(1\)\(b\)](#). In adult cases, the rules governing criminal procedure apply. *Id.* [Wis. Stat.](#) chs. 967–973 contain the rules of criminal procedure. In juvenile cases, the procedures governing delinquency adjudications apply, including the right to trial and the right to counsel. *B.L.P.*, 118 Wis. 2d at 44; see also *supra* [chs. 2](#) (rights of children, parents, and expectant mothers), [10](#) (fact-finding hearings).

## C. Defenses [§ 16.22]

### 1. [Consideration of Less Restrictive Alternatives](#) [§ 16.23]

Before holding a child in contempt, the court must "sufficiently consider" all dispositional remedies under the dispositional statutes, see [Wis. Stat. §§ 48.345, 938.34, 938.345](#), and other appropriate alternatives. *D.L.D. v. Circuit Ct. for Crawford Cnty.*, 110 Wis. 2d 168, 186–



87, 327 N.W.2d 682 (1983). Although *D.L.D.* involved noncompliance with a CHIPS dispositional order, its holding would apply to delinquency, JIPS, and UCHIPS dispositional orders as well. *See supra* [ch. 11](#) (discussion of dispositional alternatives in delinquency, JIPS, CHIPS, and UCHIPS cases). This requirement rests on the principle that before using the extraordinary power of contempt, the court should have exhausted all other alternatives. Thus, the party seeking a finding of contempt bears the burden of showing that the use of less restrictive alternatives had not succeeded. *D.L.D.*, 110 Wis. 2d at 186–87; *see* Marygold Melli & Eileen Hirsch, *Wisconsin Juvenile Court Practice in Delinquency and Status Offense Cases* § 13.10 (2d ed. 1983).

Indeed, in punitive contempt cases, defense counsel could argue that the jury should decide the question of the availability of less restrictive alternatives, with the state having to prove beyond a reasonable doubt the unavailability of those alternatives. *See D.L.D.*, 110 Wis. 2d at 187. As the supreme court noted in *D.L.D.*, given the “severe nature of the contempt power,” a “complete exhaustion of alternatives” is required with “findings concerning each remedy’s relevancy and effectiveness.” *Id.*

## 2. Length of Jail Time Excessive [§ 16.24]

Generally, an individual incarcerated for remedial contempt remains in jail until he or she complies with the court order, for a maximum period of six months. [Wis. Stat.](#) § 785.04(1)(b). Therefore, in most cases, the possible excessiveness of the length of jail time does not become an issue because the individual gains release as soon as he or she complies.

However, the length of time might become an issue in a remedial contempt based on a juvenile’s truancy, because the court would incarcerate the juvenile only after he or she has failed to purge the contempt by attending school regularly. Certainly, the length of sentence imposed in a punitive contempt action can create an issue. Under [Wis. Stat.](#) § 785.04(2)(a), the maximum sentence for punitive contempt is one year.

**Note.** One issue that arises frequently involves the unit of prosecution in truancy cases—for example, whether courts have authority to order a truant child to serve, for example, 10 days in jail for each day of school missed. The court of appeals’ decision in *State v. Ellis H. (In the Interest of Ellis H.)*, 2004 WI App 123, 274 Wis. 2d 703, 684 N.W.2d 157, provides guidance on this issue. In that case, the court held that a delinquent juvenile who violates his or her dispositional order could be sanctioned “per incident” rather than “per condition violation.” *See* [Wis. Stat.](#) § 938.355(6); *Ellis H.*, 2004 WI App 123, ¶ 7, 274 Wis. 2d 703. The court’s discussion of the definition of the term *incident* may also prove useful in the context of a contempt action.

As with disposition, the length of jail time imposed by the court remains subject to the “erroneous exercise of discretion” standard: the court must base a sentence on legally relevant factors stated on the record. *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

## 3. Nature of Contempt Action [§ 16.25]

Because children are afforded more due-process protections in punitive contempt actions than in remedial contempt actions, defense counsel must ensure that punitive sanctions do not sneak in under the guise of remedial sanctions. If the child cannot comply with the condition ordered (i.e., cannot purge the contempt), then the sanction is unconditional in nature and, therefore, punitive.

For example, in *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 456 N.W.2d 867 (Ct. App. 1990), the court of appeals reversed a finding of contempt, holding the proceeding punitive rather than remedial because although the contempt action was characterized as remedial, the contemnor could not purge the contempt while serving time in the county jail. Because the circuit court did not follow the required procedures for imposing punitive sanctions, the appellate court reversed the order.

## 4. Reasonableness of Purge Condition [§ 16.26]

Purge conditions must be feasible and reasonably related to the cause or nature of the contempt. *State ex rel. V.J.H. v. C.A.B.*, 163 Wis. 2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991). To qualify as feasible, the purge condition must remain under the contemnor’s control. For example, the court of appeals has held that finding and holding a job does not qualify as a feasible condition (i.e., a condition within the sole power of the contemnor) because hiring involves “an affirmative act by another individual.” *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 343, 456 N.W.2d 867 (Ct. App. 1990). Therefore, the court of appeals held it an erroneous exercise of discretion for the court to order this type of purge provision. *Id.*

## VI. [Standard Juvenile Court Forms](#) [§ 16.27]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose   |
|-------------------------|---------------------------|---|---|
| <a href="#">JD-1749</a> | Ch. 938                   | Acknowledgment of dispositional conditions and sanctions (delinquency/JIPS) | Statement signed by juvenile indicating an understanding of the dispositional conditions, the possible sanctions for a violation, and the caseworker's ability to take the juvenile into custody for 72 hours while investigating a possible violation  |
| <a href="#">JD-1756</a> | Ch. 938                   | Acknowledgment of dispositional conditions and sanctions (habitual truancy) | Statement signed by a juvenile indicating an understanding of the sanctions available to the court for a violation of a dispositional order pertaining to habitual truancy and the authority of the social worker to order a 72-hour hold on the juvenile while an alleged violation of a dispositional order is being investigated |
| <a href="#">JD-1770</a> | Ch. 938                   | Short term detention—pending investigation/as a consequence                 | Document authorizing custody hold of juvenile pending investigation of an alleged violation of a dispositional order or as a consequence for violation of a dispositional order   |
| <a href="#">JD-1773</a> | Ch. 938                   | Motion for sanctions  | Motion by the district attorney, corporate counsel, agency representative, or circuit/municipal court to impose sanctions on a juvenile for a violation of a court order  |
| <a href="#">JD-1774</a> | Ch. 938                   | Order on motion for sanctions   | Formal order imposing sanctions for a violation of a dispositional order  |

## Supplement Chapter 17

### Termination of Parental Rights

Book sections supplemented: [17.1](#), [17.3](#), [17.7](#), [17.12](#), [17.26](#), [17.30](#), [17.37](#), [17.42](#), [17.50](#), [17.52](#), [17.54](#), [17.55](#), [17.59](#), [17.62](#), and [17.64](#)

Book section replaced: [17.17](#)

#### 17.1 Scope of Chapter

[Page 3: Replaced footnote 1](#)



<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024); and all references to the Wisconsin Jury Instructions—Children are current through the July 2024 release.

### 17.3 [Nature of Termination Proceedings] In General

[Page 3: Added textual sentence and citation to end of second paragraph in section](#)

If a TPR order terminates the rights of only one parent, the rights of the other parent remain unaffected. [Wis. Stat.](#) § 48.43(3). Once the court terminates a parent’s rights, the parent does not have any right of visitation with the child. The parent cannot inherit from the child once parental rights are terminated. *Black v. Pamanet (In re Est. of Pamanet)*, [46 Wis. 2d 514](#), [175 N.W.2d 234](#) (1970). However, in general, a court is to favor a child having two parents, especially in voluntary TPR cases. See *A.B. v. P.B. (In the Int. of A.B.)*, [151 Wis. 2d 312](#), 322, [444 N.W.2d 415](#) (Ct. App. 1989) (“While the vicissitudes of life place many children in one-parent circumstances, it is generally better for children to have two parents.”).

### 17.7 [Nature of Termination Proceedings] [Rights of Parents in TPR Proceedings] Right to Counsel

[Page 5: Added paragraph before Note in section](#)

In 2024, the Wisconsin Supreme Court evaluated the effects of this default requirement under [Wis. Stat.](#) § 48.23(2)(b) in *State v. R.A.M. (In re Termination of Parental Rights to P.M.)*, 2024 WI 26, [412 Wis. 2d 285](#), [8 N.W.3d 349](#). Even without requiring the severe consequence of the waiver of counsel, the court concluded that the statute provides a two-day waiting period between the finding of default and the holding of a hearing for the dispositional phase.

### 17.12 [Nature of Termination Proceeding] [Rights of Parents in TPR Proceedings] Burden of Proof

[Page 7: Added Comment to end of section](#)

**Comment.** While the burden of proof at the fact-finding stage is more-settled law, the Wisconsin Court of Appeals and the Wisconsin Supreme Court have been struggling to define what, if any, burden of proof applies at the dispositional phase and to whom the burden applies.

In *State v. A.G. (In re Termination of Parental Rights to A.G.)*, [2023 WI 61](#), [408 Wis. 2d 413](#), [992 N.W.2d 75](#), the Wisconsin Supreme Court addressed whether a parent was entitled to plea withdrawal when the circuit court advised the parent about a burden of proof at the dispositional hearing and denied the parent’s plea withdrawal. It was unclear what burden, if any, would apply after the fractured (2–2–2) decision in *A.G.*

In a follow-up decision, *State v. B.W. (In re Termination of Parental Rights to B.W.)*, 2024 WI 28, [412 Wis. 2d 364](#), [8 N.W.3d 22](#), the supreme court determined that the parent was not entitled to a plea withdrawal because he was not misinformed of the burden of proof that applies at disposition, but the majority in *B.W.* declined to make an ultimate finding about what the burden of proof is. See Christopher R. Foley, *Left in the Dark: State v. A.G. & Burden of Proof in Involuntary TPR Proceedings*, Wis. Law., July 2024, at 26.

*State v. H.C. (In re Termination of Parental Rights to H.C.)*, [No. 2023AP1950](#), [2024 WL 934221](#) (Wis. Ct. App. Mar. 5, 2024) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)) (review granted), a decision by District I of the Wisconsin Court of Appeals, involved an appellant-parent who argued that the dispositional statute ([Wis. Stat.](#) § 48.426) is “facially unconstitutional because it does not define a burden of proof for the State at the dispositional phase of a proceeding to terminate parental rights.” *Id.* ¶ 15. The court of appeals found that a preponderance-of-the-evidence standard should apply. The Wisconsin Supreme Court granted a petition for review of the *H.C.* decision and is expected to address the question of the burden of proof at disposition as part of this ongoing litigation.

### 17.17 [Grounds for Termination of Parental Rights] Relinquishment

[Page 9: Replaced section](#)

To establish that a parent has relinquished a child for the purpose of terminating parental rights, a court must find that, when the child was 72 hours old or younger, the parent relinquished custody of the child under [Wis. Stat.](#) § 48.195(1m), the safe-haven law. [Wis. Stat.](#) § 48.415(1m). [Wis. Stat.](#) § 48.195(1m) permits a parent to relinquish custody of a newborn child to certain individuals specified by statute—a hospital staff person, a law enforcement officer, or an emergency medical services (EMS) practitioner. The person taking custody of the newborn must reasonably believe that the child is 72 hours old or younger, and the parent must not express an intent to return for the child.

A parent may also call 911 to have a law enforcement officer or an EMS practitioner meet the parent and take the child into custody. [Wis. Stat. § 48.195\(1m\)](#).

2023 Wis. Act 79 expanded the newborn safe-haven law to provide for the anonymous surrender of a newborn infant through the use of a newborn infant safety device, also called a “baby box.” [Wis. Stat. § 48.195](#). A parent who surrenders a newborn infant pursuant to this law has the right to remain anonymous, but the relinquishment itself can form the basis of probable cause for a CHIPS petition. It can also form the basis of a TPR petition under [Wis. Stat. § 48.415\(1m\)](#).

## 17.26 [Grounds for Termination of Parental Rights] Commission of a Felony Against a Child

[Page 15: Added paragraph to end of section](#)

In *Brown County Department of Human Services v. S.K. (In re Termination of Parental Rights to R.M.)*, [2023 WI App 27](#), [407 Wis. 2d 893](#), [992 N.W.2d 208](#), the court expanded the interpretation of this ground to include the conviction of a serious felony *as party to a crime*, if the parent directly committed the crime. This case involved the interpretation of the “serious felony” definition under [Wis. Stat. § 48.415\(9m\)](#) and its subsections. In this case, the court found that “a conviction for neglect of a child resulting in death as a party to the crime qualifies as a serious felony for purposes of [[Wis. Stat. § 48.415\(9m\)](#)] if the individual in question directly committed that crime.” *Id.* ¶ 2. This case shows that detailed review of all applicable statutes is required, especially for TPR grounds that require review of criminal convictions and criminal statutes.

## 17.30 [Procedure] Filing the Petition

[Page 17: Added paragraph to end of section](#)

See also *State v. Courtney E. (In the Interest of Courtney E.)*, [184 Wis. 2d 592](#), [516 N.W.2d 422](#) (1994), setting forth the standards for a CHIPS petition, which can be applied to TPR cases as well.

## 17.37 [Procedure] Time Periods

[Page 21: Added paragraph before last Note in section](#)

In 2024, the Wisconsin Supreme Court evaluated the effects of the default requirement under [Wis. Stat. § 48.23\(2\)\(b\)](#) in *State v. R.A.M. (In re Termination of Parental Rights to P.M.)*, [2024 WI 26](#), [412 Wis. 2d 285](#), [8 N.W.3d 349](#). The court concluded that the statute, even without requiring the severe consequence of the waiver of counsel, provides a two-day waiting period between the finding of default and the holding of a hearing for the dispositional phase.

## 17.42 [Procedure] [Initial Hearing on Petition] Admission to the Petition

[Page 26: Added Practice Tip and paragraphs to end of section](#)

**Practice Tip.** Especially in light of recent Wisconsin Supreme Court jurisprudence, defense counsel should be very cautious about no-contest pleas to the petition.

In *State v. A.G. (In re Termination of Parental Rights to A.G.)*, [2023 WI 61](#), [408 Wis. 2d 413](#), [992 N.W.2d 75](#), the Wisconsin Supreme Court addressed whether a parent was entitled to plea withdrawal when the circuit court advised the parent about a burden of proof at the dispositional hearing and denied the parent’s plea withdrawal. It was unclear what burden, if any, would apply after the fractured (2–2–2) decision in *A.G.* In a follow-up decision, *State v. B.W. (In re Termination of Parental Rights to B.W.)*, [2024 WI 28](#), [412 Wis. 2d 364](#), [8 N.W.2d 22](#), the court determined that the parent was not entitled to a plea withdrawal because he was not misinformed of the burden of proof that applies at disposition, but the majority in *B.W.* declined to make an ultimate finding about what the burden of proof is. *See* Foley, Supp. § 17.12.

In both *A.G.* and *B.W.*, the Wisconsin Supreme Court upheld the plea colloquy, applying a deferential standard to the circuit court.

In an additional case, *State v. Rippentrop*, [2023 WI App 15](#), [406 Wis. 2d 692](#), [987 N.W.2d 801](#) (review denied), the court of appeals explored a nonprosecution agreement that required the voluntary termination of parental rights. The court determined that the

nonprosecution agreement did not violate public policy and required the dismissal of charges against the parents in a related criminal case upon the termination of the parents' parental rights.

## 17.50 [Procedure] [Fact-Finding Hearing] [Rules of Civil Procedure in Juvenile Court Proceedings] Default for Failure to Appear

[Page 30: Added paragraph after Caution in section](#)

In at least one unpublished, citable case, the Wisconsin Court of Appeals determined that a parent's failure to appear at a single pretrial hearing was not egregious and did not support a default judgment. *See Kenosha Cnty. Div. of Child & Fam. Servs. v. D.R.-R. (In re Termination of Parental Rts. to S.R.R.)*, [No. 2022AP1812](#), [2023 WL 3745604](#) (Wis. Ct. App. June 1, 2023) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

[Page 30: Added paragraph to end of section](#)

In 2024, the Wisconsin Supreme Court evaluated the effects of the default requirement under [Wis. Stat.](#) § 48.23(2)(b) in *State v. R.A.M. (In re Termination of Parental Rights to P.M.)*, 2024 WI 26, [412 Wis. 2d 285](#), [8 N.W.3d 349](#). The court concluded that the statute, even without requiring the severe consequence of waiver of counsel, provides a two-day waiting period between the finding of default and the holding of a hearing for the dispositional phase.

## 17.52 [Procedure] [Fact-Finding Hearing] Finding of Unfitness

[Page 32: Added citation to end of section](#)

See also Wis. [JI](#)—Children 346B.

## 17.54 [Procedure] [Disposition] In General

[Page 32: Added paragraphs to end of section](#)

The Wisconsin Court of Appeals and Wisconsin Supreme Court have been struggling to define what, if any, burden of proof applies at the dispositional phase and to whom the burden applies.

In *State v. A.G. (In re Termination of Parental Rights to A.G.)*, [2023 WI 61](#), [408 Wis. 2d 413](#), [992 N.W.2d 75](#), the Wisconsin Supreme Court addressed whether a parent was entitled to plea withdrawal when the circuit court advised the parent about a burden of proof at the dispositional hearing and denied the parent's plea withdrawal. It was unclear what burden, if any, would apply after the fractured (2–2–2) decision in *A.G.* In a follow-up decision, *State v. B.W. (In re Termination of Parental Rights to B.W.)*, 2024 WI 28, [412 Wis. 2d 364](#), [8 N.W.3d 22](#), the court found that the parent was not entitled to a plea withdrawal because he was not misinformed of the burden of proof that applies at disposition, without making an ultimate finding about what the burden of proof is. See Foley, Supp. § 17.12.

*State v. H.C. (In re Termination of Parental Rights to H.C.)*, [No. 2023AP1950](#), [2024 WL 934221](#) (Wis. Ct. App. Mar. 5, 2024) (unpublished opinion citable per [Wis. Stat.](#) § 809.23(3)(b)), a decision by District I of the Wisconsin Court of Appeals, involved an appellant-parent who argued that the dispositional statute ([Wis. Stat.](#) § 48.426) is “facially unconstitutional because it does not define a burden of proof for the State at the dispositional phase of a proceeding to terminate parental rights.” *Id.* ¶ 15. The court of appeals found that a preponderance-of-the-evidence standard should apply. The Wisconsin Supreme Court granted a petition for review of the *H.C.* decision and is expected to address the question of the burden of proof at disposition as part of this ongoing litigation.

## 17.55 [Procedure] [Disposition] Standard and Factors Considered

[Page 33: Added paragraphs to end of section](#)

The Wisconsin Court of Appeals and Wisconsin Supreme Court have been struggling to define what, if any, burden of proof applies at the dispositional phase and to whom the burden applies.

In *State v. A.G. (In re Termination of Parental Rights to A.G.)*, [2023 WI 61](#), [408 Wis. 2d 413](#), [992 N.W.2d 75](#), the Wisconsin Supreme Court addressed whether a parent was entitled to plea withdrawal when the circuit court advised the parent about a burden of proof at the

dispositional hearing and denied the parent's plea withdrawal. It was unclear what burden, if any, would apply after the fractured (2–2–2) decision in *A.G.* In a follow-up decision, *State v. B.W. (In re Termination of Parental Rights to B.W.)*, 2024 WI 28, [412 Wis. 2d 364](#), [8 N.W.3d 22](#), the court found that the parent was not entitled to a plea withdrawal because he was not misinformed of the burden of proof that applies at disposition, without making an ultimate finding about what the burden of proof is. *See* *Foley*, Supp. § 17.12.

*State v. H.C. (In re Termination of Parental Rights to H.C.)*, No. 2023AP1950, [2024 WL 934221](#) (Wis. Ct. App. Mar. 5, 2024) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), a decision by District I of the Wisconsin Court of Appeals, involved an appellant-parent who argued that the dispositional statute ([Wis. Stat.](#) § 48.426) is “facially unconstitutional because it does not define a burden of proof for the State at the dispositional phase of a proceeding to terminate parental rights.” *Id.* ¶ 15. The court of appeals found that a preponderance-of-the-evidence standard should apply. The Wisconsin Supreme Court granted a petition for review of the *H.C.* decision and is expected to address the question of the burden of proof at disposition as part of this ongoing litigation.

## 17.59 [Procedure] [Disposition] [Decision by the Court] Termination of Parental Rights

[Page 34: Amended paragraph 1.d. in numbered list](#)

- d. A relative with whom the child resides, if the relative has filed a petition to adopt the child, is a kinship care provider, or is receiving payments under [Wis. Stat.](#) § 48.62(4) (foster care) for providing care and maintenance for the child, [Wis. Stat.](#) § 48.427(3m)(a)5., *as amended by* 2023 Wis. Act 119 (eff. July 1, 2025, or on date specified in Wis. Admin. Reg. notice); or

## 17.62 Voluntary Termination of Parental Rights

[Page 38: Added paragraph after second paragraph in section](#)

Voluntary consent can be considered valid even when the parents enter into an agreement to allow for nonprosecution of criminal charges. *State v. Rippentrop*, [2023 WI App 15](#), [406 Wis. 2d 692](#), [987 N.W.2d 801](#) (review denied), the court explored a nonprosecution agreement that required the voluntary termination of parental rights. The court determined that the nonprosecution agreement did not violate public policy and required the dismissal of charges against the parents in a related criminal case upon the termination of the parents' parental rights.

## 17.64 [Termination of Parental Rights Under the Indian Child Welfare Act] In General

[Page 40: Added paragraph to end of section](#)

ICWA and its applicability to child-welfare cases remains a point of ongoing litigation at the U.S. Supreme Court level. *See Haaland v. Brackeen*, 599 U.S. 255 (2023), in which the Supreme Court rejected a challenge to ICWA. *See also* Jennah Marie Curtin, *Implications of Haaland and the Indian Child Welfare Act*, State Bar of Wis.: Child. & the L. Sec. Blog (Oct. 10, 2023), <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=30043>.

# Chapter 17

## Termination of Parental Rights

### I. [Scope of Chapter](#)

#### [§ 17.1]

This chapter discusses termination of parental rights (TPR) cases under [Wis. Stat.](#) §§ 48.41 and 48.415. Except where noted, this chapter will not duplicate subject matter discussed in other chapters. Nor will the chapter offer an in-depth discussion of civil trial practice. Where the Wisconsin Children's Code explicitly incorporates procedures from the rules governing civil and criminal trial practice, the text will direct the reader to those provisions in the rules of civil procedure and the Criminal Code, but discussion will be limited to case law examining those provisions in TPR cases. Joint termination and adoption proceedings under [Wis. Stat.](#) §§ 48.835 and 48.837 are discussed only when relevant to TPR cases under [Wis. Stat.](#) §§ 48.41 and 48.415. Wisconsin has codified the Indian Child Welfare Act (ICWA), which

has a direct effect on any TPR involving an Indian child. The sections below include references to ICWA and note its effect on TPR proceedings.<sup>1</sup>

For additional information about TPR procedures, see Matthew W. Giesfeldt, [Termination of Parental Rights and Adoption](#) (State Bar of Wis. 3d ed. 2017 & Supp.).

**Note.** The term “termination of parental rights” and the abbreviation “TPR” are used interchangeably throughout this chapter.

## II. Nature of Termination Proceedings [§ 17.2]

### A. [In General](#)

#### [§ 17.3]

Subchapter VIII of the Children’s Code governs TPR proceedings. An order terminating parental rights permanently severs all legal rights and duties between parent and child. [Wis. Stat.](#) §§ 48.40(2), 48.43(2). [Wis. Stat.](#) § 48.02(13) provides the definition of parent for the purposes of [Wis. Stat.](#) ch. 48. For the purpose of involuntary TPR to a nonmarital child whose paternity has not been established, the definition of parent also includes “a person who may be the parent of such a child.” [Wis. Stat.](#) § 48.40(1r); *see also State v. James P. (In re Termination of Parental Rts. to Chezron M.)*, 2004 WI App 124, 274 Wis. 2d 494, 684 N.W.2d 164 (holding that “biological parenthood” does not turn on whether it is recognized, found, or adjudicated), *aff’d*, 2005 WI 80, 281 Wis. 2d 685, 698 N.W.2d 95.

If a TPR order terminates the rights of only one parent, the rights of the other parent remain unaffected. [Wis. Stat.](#) § 48.43(3). Once the court terminates a parent’s rights, the parent does not have any right of visitation with the child. The parent cannot inherit from the child once parental rights are terminated. [Black v. Pamanet \(In re Est. of Pamanet\)](#), 46 Wis. 2d 514, 175 N.W.2d 234 (1970).

In addition, a TPR order permanently severs all legal rights and duties between the child and “all persons whose relationship to the child is derived through [the] parent” whose parental rights are terminated, with two exceptions. [Wis. Stat.](#) § 48.43(2). The first exception states that only an order of adoption will sever the relationship between a child and any siblings. [Wis. Stat.](#) § 48.43(2)(a). The second exception provides that, until an order of adoption, the court will continue to consider relatives of the former parent as the child’s relatives “for purposes of placement of, and permanency planning for, the child.” [Wis. Stat.](#) § 48.43(2)(b).

**Note.** The legislature added the express reference to “all persons” to [Wis. Stat.](#) § 48.43(2), and the two exceptions, in 2006. 2005 Wis. Act 232. If parental rights to a child were terminated before those amendments and the child was not adopted, the child’s grandparents may retain their right to intestate inheritance. *Martinez v. Pavlik (In re Est. of Arndt)*, No. 2008AP2789, 2009 WL 2020760 (Wis. Ct. App. July 14, 2009) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

### B. Civil Versus “Quasi-Criminal” [§ 17.4]

Although TPR cases have been characterized as civil in nature, *M.W. v. Monroe Cnty. Dep’t of Hum. Servs. (In re Termination of Parental Rts. to M.A.M.)*, 116 Wis. 2d 432, 442, 342 N.W.2d 410 (1984), *overruled on other grounds by Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856, some obvious differences exist between these types of [Wis. Stat.](#) ch. 48 proceedings and other civil actions. The most obvious difference concerns the interests at stake: because the state seeks to sever completely the relationship between parent and child, the interests at stake are both “cognizable and substantial.” *See Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

In recognition of these substantial interests, the legislature has created a statutory right to counsel for parents in TPR cases. [Wis. Stat.](#) § 48.23(2); *see also supra ch. 2*. Parents in TPR cases in Wisconsin have a statutory right to effective assistance of counsel; parties in other Wisconsin civil cases generally do not have such a right. *A.S. v. State (In the Int. of M.D.(S.))*, 168 Wis. 2d 995, 1002, 485 N.W.2d 52 (1992).

### C. Rights of Parents in TPR Proceedings [§ 17.5]

#### 1. In General [§ 17.6]

Defense counsel should familiarize themselves with the rights that attach in TPR proceedings and whether the rights arise by statute or under the federal or state constitution. *See supra ch. 2* (rights of parties in juvenile court proceedings).



## 2. [Right to Counsel](#)

### [§ 17.7]

The Children's Code provides the *statutory* right to counsel for parents in TPR proceedings. [Wis. Stat.](#) § 48.23(2). Implicit in the right to counsel is the right to *effective* assistance of counsel, *A.S. v. State (In the Int. of M.D.(S.))*, 168 Wis. 2d 995, 485 N.W.2d 52 (1992), that is, representation that is “zealous, competent and independent.” *E.H. v. Milwaukee Cnty. (In the Int. of T.L.)*, 151 Wis. 2d 725, 737, 445 N.W.2d 729 (Ct. App. 1989). (For a discussion of the standard for effective assistance of counsel in criminal cases, see *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Harvey*, 139 Wis. 2d 353, 407 N.W.2d 235 (1987).).

Under some circumstances, parents may also have a *constitutional* right to counsel. The U.S. Supreme Court held that the Due Process Clause of the 14th Amendment requires the appointment of counsel for indigent parents in some cases, depending on the facts of the case and the potential for error. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31 (1981). The Court noted that in any given case, if “the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak,” this set of circumstances might overcome the presumption against the right to appointed counsel. *Id.* Because of the interests at stake, however, the Court characterized states as “enlightened and wise” when they provide a statutory right to counsel. *Id.* at 33–34.

A parent 18 years old or older can waive the parent’s right to counsel, but a parent under 18 years of age cannot. [Wis. Stat.](#) § 48.23(2). For a discussion of the standards for a voluntary waiver of counsel, see [chapter 2](#), *supra*.

[Wis. Stat.](#) § 48.23(2) mandates that a parent who once appears in an involuntary TPR proceeding is entitled to representation throughout the proceeding. There are two exceptions to this requirement. First, a parent who is 18 years of age or older may waive counsel if the court is satisfied that the waiver is “knowingly and voluntarily made.” [Wis. Stat.](#) § 48.23(2)(b)1.

A parent can also waive the right to counsel and the right to appear by counsel by the parent’s actions. [Wis. Stat.](#) § 48.23(2)(b)3. To find that this waiver has occurred, the court must order the parent to appear in person at all subsequent hearings, the parent must have failed to appear, and the judge must find that the failure to appear was egregious and without clear and justifiable excuse. (Failure by a parent 18 years of age or older “to appear in person at consecutive hearings as ordered is presumed to be ... egregious and without clear and justifiable excuse.” *Id.*) If the court finds this waiver of counsel and waiver of the right to appear by counsel, then the judge may hold a dispositional hearing on the contested adoption or involuntary TPR, but the judge must wait at least two days before holding that hearing. During that time, counsel has the continuing obligation to attempt to inform the parent of the actions taken by the court and to file a motion to vacate or reconsider the default judgment. At the hearing to vacate or reconsider the default judgment, if the parent waived counsel under [Wis. Stat.](#) § 48.23(2)(b)1. or was presumed to have waived counsel under [Wis. Stat.](#) § 48.23(2)(b)3., the parent must appear by counsel unless the parent makes a knowing and voluntary waiver of counsel or the parent is presumed to waive counsel by the parent’s actions. [Wis. Stat.](#) § 48.23(2)(c), *created by* 2013 Wis. Act 337.

**Note.** In addition to reviewing [Wis. Stat.](#) § 48.23(2), counsel should be aware of [SCR](#) 11.02: “Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person.”

Interpreting [Wis. Stat.](#) § 48.23(2) (2003–04), the Wisconsin Supreme Court mandated that parents who had appeared in TPR proceedings were entitled to representation throughout the proceedings, and the only way such representation could be waived was by the circuit court questioning the parent to determine whether the waiver of counsel was “knowledgeable and voluntary.” *State v. Shirley E. (In re Termination of Parental Rts. to Torrance P.)*, 2006 WI 129, ¶¶ 56–57, 298 Wis. 2d 1, 724 N.W.2d 623. Under [Wis. Stat.](#) § 48.23 (2003–04), if a parent did not personally appear at a hearing, counsel for the parent had to continue to participate because the parent retained the statutory right to counsel throughout the proceedings. *Id.* ¶¶ 43–46; *State v. Patti P. (In re Termination of Parental Rts. to Phillip E.)*, No. 2007AP324, 2007 WL 2769400 (Wis. Ct. App. Sept. 25, 2007) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)). The statutory right to counsel for a parent in a TPR proceeding is no more extensive than the constitutional right to counsel for a defendant in a criminal proceeding; no improper denial of the right to counsel occurs in a TPR proceeding unless the denial is a structural error. *Kevin G. v. Jennifer M.S. (In re Termination of Parental Rts. to Dakota L.G.)*, No. 2009AP1377, 2011 WL 3587414, ¶¶ 46–47 (Wis. Ct. App. Aug. 17, 2011) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

If a parent does not personally appear or appear by counsel, the right to counsel under [Wis. Stat.](#) § 48.23(2) does not come into effect. *Brown Cnty. Dep’t of Hum. Servs. v. Janice W. (In re Termination of Parental Rts. to Precious W.)*, No. 2008AP2062, 2009 WL 305314, ¶¶ 17–18 (Wis. Ct. App. Feb. 10, 2009) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)).



Adult parents may waive their right to counsel and represent themselves if the court finds they are competent to do so. *Dane Cty. Dep't of Hum. Servs. v. Susan P.S. (In re Termination of Parental Rts. to Sophia S.)*, 2006 WI App 100, 293 Wis. 2d 279, 715 N.W.2d 692. The court must apply the self-representation competency standard developed in criminal cases. See *Pickens v. State*, 96 Wis. 2d 549, 568–70, 292 N.W.2d 601 (1980), *overruled in part, aff'd in part*, *State v. Klessig*, 211 Wis. 2d 194, 206, 212, 564 N.W.2d 716 (1997) (affirming *Pickens* as to standard of competency).

### 3. Right to Jury Trial [§ 17.8]

Although due process requires that parents be afforded a meaningful hearing before their parental rights are terminated, *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that parents are constitutionally entitled to hearing before children removed from their custody), parents do not have the right to a jury trial under either the state or federal constitution.

Parents have a statutory right to a jury trial under [Wis. Stat.](#) § 48.422(4), but they must request a jury trial at the initial hearing on the TPR petition. [Wis. Stat.](#) § 48.422(4); *see also infra* § 17.39. Any party whose rights may be affected by the TPR can request a jury trial. This is generally the guardian ad litem and any parent, but some petitioners may argue that they, too, are entitled to demand a jury trial. *See Wis. Stat.* §§ 48.31(2), 48.422(4). The jury must consist of 12 persons unless the parties have agreed to a lesser number. [Wis. Stat.](#) § 48.31(2). The rules of civil procedure apply. *See infra* §§ 17.46–.50. Once a jury trial is requested, the demand cannot be withdrawn without consent of all parties. [Wis. Stat.](#) § 805.01(3).

### 4. Right Against Self-Incrimination [§ 17.9]

Although delinquency proceedings qualify as criminal proceedings for purposes of the constitutional right against self-incrimination, *see supra* [ch. 2](#), that right does not attach to noncriminal proceedings such as TPR proceedings. Under *In re Gault*, 387 U.S. 1 (1967), juvenile delinquency proceedings are regarded as criminal proceedings for purposes of the privilege against self-incrimination. For further discussion of the right against self-incrimination in juvenile proceedings, *see chapter 2, supra*. In nondelinquency proceedings, however, if a witness has a “real and appreciable apprehension that the information requested could be used against him [or her] in a criminal proceeding,” the witness can invoke the privilege. *Grant v. State (In re Grant)*, 83 Wis. 2d 77, 81, 264 N.W.2d 587 (1978). For example, the supreme court reversed a contempt judgment arising from an individual’s refusal to testify in a paternity action, holding her silence to be a proper exercise of her constitutional right. *Id.* But *see Baltimore City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549 (1990) (rejecting mother’s asserted Fifth Amendment privilege against self-incrimination as ground to resist order to produce her child in juvenile court). A witness can justify a refusal to answer only if the potential exists for being subjected to criminal actions or to civil actions “so far criminal in their nature” as to trigger the protections of the Fifth Amendment. *United States v. Ward*, 448 U.S. 242, 253–54 (1980). Defense counsel should pay particular attention to any criminal charges pending against the parent or the potential for criminal charges, especially when termination rests on a claim of neglect and abuse. [Wis. Stat.](#) ch. 948 governs criminal charges for abuse or neglect.

**Comment.** Under [Wis. Stat.](#) § 48.243, parents have an independent, statutory right to remain silent in proceedings for children in need of protection or services (CHIPS). [Wis. Stat.](#) § 48.243(1)(c). However, the silence of a parent or of a child over the age of 12 who is the focus of a CHIPS inquiry may be relevant. *Id.* [Wis. Stat.](#) § 48.243 does not apply to TPR proceedings, and the statutory provisions governing TPR proceedings during the fact-finding stage, *see Wis. Stat.* §§ 48.42, 48.422, 48.424, do not provide a statutory right to remain silent for parents facing TPR proceedings. Yet it makes little sense to accord parents in CHIPS proceedings more rights than parents facing termination of their parental rights.

### 5. Right to Cross-examine Witnesses [§ 17.10]

The Sixth Amendment’s Confrontation Clause applies only to criminal prosecutions. *See also* Wis. Const. art. I, § 7, which provides the accused in criminal prosecutions the right to “meet the witnesses face to face.” In TPR proceedings, parents have the right to confront and cross-examine witnesses under the Due Process Clause of the 14th Amendment. *See Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982). Even when the interest at stake involves the loss of welfare benefits, due process requires the “effective opportunity to defend by confronting any adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). *See also generally* 2 Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* (2014).

### 6. Right to Present Evidence [§ 17.11]

The right to present a defense is a fundamental aspect of due process. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). This principle is reflected throughout the Children’s Code, which provides the right to present and subpoena witnesses, *see Wis. Stat.* § 48.243(1)(f), to serve compulsory process on any person whose presence is necessary, *see Wis. Stat.* § 48.27(2), and to present evidence at various stages of the

proceedings, *see* [Wis. Stat.](#) §§ 48.335(3), 48.365(2m)(a), 48.427(1) (“Any party may present evidence relevant to the issue of disposition, including expert testimony....”).

## 7. [Burden of Proof](#)

### [§ 17.12]

In TPR proceedings, the petitioner bears the burden of proving by clear and convincing evidence the allegations of the petition. [Wis. Stat.](#) §§ 48.31(1), 48.424(2). The Constitution permits this lesser standard. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982); *R.D.K. v. Sheboygan Cnty. Soc. Servs. Dep’t (In re Termination of Parental Rts. to A.M.K.)*, 105 Wis. 2d 91, 110, 312 N.W.2d 840 (Ct. App. 1981).

**Caveat.** An exception to this standard applies to TPR proceedings brought under the Wisconsin Indian Child Welfare Act (WICWA), because WICWA requires proof beyond a reasonable doubt on some elements—specifically, on the issue that “continued custody of the Indian child by the Indian child’s parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028(4)(e)1.” [Wis. Stat.](#) § 48.415; *see also* 25 [U.S.C.](#) § 1912(f); *Monroe Cnty. Dep’t of Human Servs. v. Luis R. (In re Termination of Parental Rts. to Vaughn R.)*, 2009 WI App 109, ¶¶ 19–29, 320 Wis. 2d 652, 770 N.W.2d 795. If the court grants partial summary judgment in the grounds phase of a TPR proceeding, then it must make the WICWA determinations at the dispositional hearing. [Wis. Stat.](#) § 48.415. In termination cases brought under both the Children’s Code and WICWA, the court can instruct the jury on the dual burdens of proof. *I.P. v. State (In the Int. of D.S.P.)*, 157 Wis. 2d 106, 458 N.W.2d 823 (Ct. App. 1990), *aff’d*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992).

## 8. [Substitution of Judge](#) [§ 17.13]

Each nonpetitioning party has a statutory right to request a substitution of judge in TPR proceedings. [Wis. Stat.](#) §§ 48.29, 48.422(5); *State ex rel. Julie A.B. v. Circuit Ct. (In re Termination of Parental Rts. to Prestin T.B.)*, 2002 WI App 220, 257 Wis. 2d 285, 650 N.W.2d 920. A party must make the substitution request before or during the plea hearing. [Wis. Stat.](#) § 48.29(1). The court need not inform the parties that [Wis. Stat.](#) § 48.422(5) provides the right to a continuance to consult with counsel regarding judicial substitution. *Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856.

## III. [Grounds for Termination of Parental Rights](#) [§ 17.14]

### A. [In General](#) [§ 17.15]

The Children’s Code provides 12 grounds for termination of parental rights. [Wis. Stat.](#) § 48.415. The petitioner must allege one or more of the grounds and must prove the alleged grounds by clear and convincing evidence.

### B. [Abandonment](#) [§ 17.16]

In defining *abandonment*, the legislature focused on the “severity and completeness” of the act. *P.S. v. G.O. (In the Int. of T.P.S.)*, 168 Wis. 2d 259, 265, 483 N.W.2d 591 (Ct. App. 1992). In adopting [Wis. Stat.](#) § 48.415(1)(a)1., 2, and 3., for example, the legislature specified clear time limits for abandonment under three sets of circumstances. *Id.*

First, the petitioner can prove abandonment if the child has been left without provision for the child’s care or support and if, upon investigation, the petitioner cannot find either parent after 60 days. [Wis. Stat.](#) § 48.415(1)(a)1.

Second, the petitioner can prove abandonment if a court order placed the child outside the parent’s home or continued the child in a placement outside the parent’s home, if the court order contained notice of the possible grounds for termination and of conditions for the child’s return, [Wis. Stat.](#) §§ 48.356(2), 938.356(2), and if the parent has failed to visit or communicate with the child for a period of three months or longer, [Wis. Stat.](#) § 48.415(1)(a)2. The three-month period of no contact need not immediately precede the filing of the petition. *See, e.g., Rock Cnty. Dep’t of Soc. Servs. v. K.K. (In the Int. of K.K.)*, 162 Wis. 2d 431, 440–41, 469 N.W.2d 881 (Ct. App. 1991). But the period of abandonment under [Wis. Stat.](#) § 48.415(1)(a)2. must fall within the duration of the CHIPS-based placement of the child outside the parental home. *Heather B. v. Jennifer B. (In re Termination of Parental Rts. to Cordell J.B.)*, 2011 WI App 26, 331 Wis. 2d 666, 794 N.W.2d 800.

**Comment.** Under [Wis. Stat.](#) § 48.356 or [Wis. Stat.](#) § 938.356, the court must explain to a parent of a child or juvenile found to be in need of protection or services (CHIPS or JIPS), the parent of a juvenile adjudicated delinquent, or the expectant mother of an unborn

child found in need of protection or services (UCHIPS) the possible grounds for termination of parental rights and the conditions necessary for the child's or expectant mother's return home or for the parent to be granted visitation. The judge must give these "warnings" orally at the dispositional hearing and when the court reviews the permanency plan. The warnings must also appear in the dispositional order if the order places the child, or expectant mother in a UCHIPS action, outside the home. The supreme court has held that only one written order need contain the warnings. *See St. Croix Cty. Dep't of Health & Hum. Servs. v. Michael D. (In re Termination of Parental Rts. to Matthew D.)*, 2016 WI 35, [368 Wis. 2d 170](#), 880 N.W.2d 107.

Third, the petitioner can prove abandonment if the parent leaves the child with any person and the parent fails to visit or communicate with the child for a period of six months or longer, even though the parent knows or could discover the child's whereabouts during this time. [Wis. Stat.](#) § 48.415(1)(a)3. The six-month period need not immediately precede the filing of the TPR petition. *P.S.*, 168 Wis. 2d at 265.

A parent's failure to have contact with a child during the statutory time periods creates only a *presumption* of abandonment. *Id.* at 266. In computing the periods during which a parent fails to visit or communicate with the child, any period during which a judicial order prohibited the parent from visiting or communicating with the child must be excluded. [Wis. Stat.](#) § 48.415(1)(b). *But see Carla B. v. Timothy N. (In re Termination of Parental Rts. to Jessica N.)*, 228 Wis. 2d 695, 704–05, 598 N.W.2d 924 (Ct. App. 1999) (permitting consideration of periods of no contact and no communication when parent was subject to court order that prohibited visitation but allowed communication). On the other hand, a parent's "incidental contact" with the child does not preclude the trier of fact from finding that the parent failed to visit or communicate with the child. [Wis. Stat.](#) § 48.415(1)(b).

A fourth type of abandonment focuses on the seriousness of the risk of harm to the child, regardless of the length of time for which the parent has left the child. [Wis. Stat.](#) § 48.415(1)(a)1m. The petitioner can prove abandonment if a parent leaves the child without provision for the child's care and support and in a manner that exposes the child to a substantial risk of great bodily harm or death. *Id.* [Wis. Stat.](#) § 939.22(14) defines *great bodily harm* as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

[Wis. Stat.](#) § 48.415(1)(c) discusses the affirmative defenses to abandonment and provides that the burden for proving any of those defenses is on the parent and that the burden of proof is preponderance of the evidence. In TPR proceedings for abandonment based either on the child's continuing need for protection or services, [Wis. Stat.](#) § 48.415(1)(a)2., or on the parent's failure to communicate with the child for six months or longer, [Wis. Stat.](#) § 48.415(1)(a)3., abandonment cannot be established if the parent proves that the parent (1) had good cause for not visiting or not communicating with the child, [Wis. Stat.](#) § 48.415(1)(c)1., 2., and (2) communicated about the child with those having physical custody of the child or had good cause for not communicating with them, [Wis. Stat.](#) § 48.415(1)(c)3.a., b. Good cause for failing to communicate with the child may be based on evidence that the child's age or condition would have rendered any communication with the child meaningless. [Wis. Stat.](#) § 48.415(1)(c)3.

**Note.** If a parent seeks to prove good cause based on the parent's mental condition, then that parent must use expert testimony to demonstrate that the alleged condition established good cause for failing to communicate with the child. *See Brown Cnty. Hum. Servs. v. T.F. (In re Termination of Parental Rts. to A.P.)*, 2019 WI App 18, ¶¶ 43–50, [386 Wis. 2d 557](#), 927 N.W.2d 560.

Finally, the petitioner can prove abandonment if a juvenile court has found under [Wis. Stat.](#) § 48.13(2) that the child was abandoned when the child was under one year of age or if a court has found that the parent violated [Wis. Stat.](#) § 948.20 by abandoning the child when the child was under one year of age. [Wis. Stat.](#) § 48.415(1)(a)1r. [Wis. Stat.](#) § 48.13(2) grants the juvenile court CHIPS jurisdiction over a child who has been abandoned.

**Note.** The biological father of a nonmarital child is a parent and could have his parental rights terminated based on periods of abandonment that occurred before his adjudication as the father. *State v. James P. (In re Termination of Parental Rts. to Chezron M.)*, 2005 WI 80, ¶ 15, 281 Wis. 2d 685, 698 N.W.2d 95, *aff'g* 2004 WI App 124, 274 Wis. 2d 494, 684 N.W.2d 164; *see also* [Wis. Stat.](#) § 48.40(1r) (defining a parent for the purpose of a petition for the TPR to a child as "a person who *may be* the parent of such a child") (emphasis added).

### C. Relinquishment

#### [§ 17.17]

To establish that a parent has relinquished a child for the purpose of terminating parental rights, a court must find that, when the child was 72 hours old or younger, the parent relinquished custody of the child under [Wis. Stat.](#) § 48.195(1), the safe-haven law. [Wis. Stat.](#) § 48.415(1m). [Wis. Stat.](#) § 48.195(1) permits a parent to relinquish custody of a newborn child to certain individuals specified by statute—a

hospital staff person, a law enforcement officer, or an emergency medical services (EMS) practitioner. The person taking custody of the newborn must reasonably believe that the child is 72 hours old or younger, and the parent must not express an intent to return for the child. A parent may also call 911 to have a law enforcement officer or an EMS practitioner meet the parent and take the child into custody. [Wis. Stat. § 48.195\(1\)](#).

## D. Continuing Need of Protection or Services [§ 17.18]

The statutes provide two means of establishing grounds for termination of parental rights on the basis of a continuing need of protection or services. [Wis. Stat. § 48.415\(2\)\(a\)](#), (am).

To prove that a child is in continuing need of protection or services under [Wis. Stat. § 48.415\(2\)\(a\)](#), justifying termination of parental rights, the petitioner must prove the following elements by clear and convincing evidence.

First, the child has been adjudged to be in need of protection or services and placed (or continued in a placement) outside the home pursuant to an original CHIPS, UCHIPS, or JIPS order, [Wis. Stat. §§ 48.345, 48.347, 938.345](#); *see also supra ch. 11*; an extension of disposition order, [Wis. Stat. §§ 48.365, 938.365](#); *see also supra ch. 12*; a revision of disposition order, [Wis. Stat. §§ 48.363, 938.363](#); *see also supra ch. 12*; or a change-in-placement order, [Wis. Stat. §§ 48.357, 938.357](#); *see also supra ch. 12*. To prove that the child is in continuing need of protection or services, the petitioner must prove that the child is subject to a valid CHIPS, UCHIPS, or JIPS dispositional order placing him or her outside the home at the time the petitioner seeks to terminate parental rights. [Wis. Stat. § 48.415\(2\)\(a\)1](#).

Second, the order placing the child outside the home provided the proper notice (i.e., warnings) of potential grounds for terminating parental rights and of conditions for the child's return. *Id.*

**Note.** Not every order placing a child outside the home must contain the written notice required in [Wis. Stat. §§ 48.356\(2\) and 938.356\(2\)](#). *Marinette Cnty. v. Tammy C. (In re Termination of Parental Rts. of Anthony C.)*, 219 Wis. 2d 206, 579 N.W.2d 635 (1998). Rather, at least one order placing the child outside the home must contain the [Wis. Stat. § 48.356\(2\)](#) written notice of grounds for termination that may be applicable and the conditions necessary for the child to be returned to the home. *St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D. (In re Termination of Parental Rts. to Matthew D.)*, 2016 WI 35, 368 Wis. 2d 170, 880 N.W.2d 107; *Waukesha Cnty. v. Steven H. (In re Termination of Parental Rts. of Brittany Ann H.)*, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. The notice can contain all the statutory grounds for termination, not just those applicable to the case. *See Cynthia E. v. La Crosse Cnty. Hum. Servs. Dep't (In the Int. of Jamie L.)*, 172 Wis. 2d 218, 493 N.W.2d 56 (1992). Defense counsel should inspect the last order placing the child outside the home to determine the adequacy of the written notice under [Wis. Stat. §§ 48.356 and 938.356](#) and under case law interpreting those statutes. Failing to include the conditions necessary for return in the final CHIPS order is not fatal to the TPR petition when the prior orders contained these conditions. *Waukegan Cnty. v. Lisa K. (In the Int. of Katherine N.)*, 2000 WI App 145, 237 Wis. 2d 830, 615 N.W.2d 204 (also noting that final CHIPS order arguably incorporated earlier orders—and accompanying notices of conditions—by reference).

Third, the agency responsible for the care of the child and family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court. [Wis. Stat. § 48.415\(2\)\(a\)2.b](#). The legislature has defined *reasonable effort* as:

an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

[Wis. Stat. § 48.415\(2\)\(a\)2.a](#). In other words, the legislature created a standard that considers the totality of the circumstances.

Fourth, the child has been outside the home under an order listed in [Wis. Stat. § 48.415\(2\)\(a\)1](#). for a cumulative total period of six months or longer, not including time spent outside the home as an unborn child. [Wis. Stat. § 48.415\(2\)\(a\)3](#). There is no requirement that six months elapse following the last CHIPS order before a TPR petition can be filed. *Waukegan Cnty. v. Lisa K. (In the Int. of Katherine N.)*, 2000 WI App 145, 237 Wis. 2d 830, 615 N.W.2d 204.

Fifth, the parent has failed to meet the conditions established for the child's safe return to the home, [Wis. Stat. § 48.415\(2\)\(a\)3](#). The court of appeals has held that the trial court must admit evidence of postfiling events or facts relevant to this element whether supportive of or against termination. *S.D.S. v. Rock Cnty. Dep't of Soc. Servs. (In the Int. of T.M.S.)*, 152 Wis. 2d 345, 359, 448 N.W.2d 282 (Ct. App. 1989). Prefiling facts may also be admitted. *La Crosse Cnty. Dep't of Hum. Servs. v. Tara P. (In re Termination of Parental Rts. to Deantye P.-B.)*, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194. A CHIPS dispositional order under [Wis. Stat. § 48.355\(2\)\(b\)1](#). need not include



separately listed, specific services to be sufficient notice to the parent of what she or he needs to do for the child to be returned. *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Tanya M.B. (In re Termination of Parental Rts. to Elijah W.L.)*, [2010 WI 55](#), ¶ 48, 325 Wis. 2d 524, 785 N.W.2d 369.

**Note.** If the conditions of return are impossible to complete because of a parent's incarceration, the parent may file a motion to dismiss based on the rationale in *Kenosha County Department of Human Services v. Jodie W. (In re Termination of Parental Rts. to Max G.W.)*, [2006 WI 93](#), 293 Wis. 2d 530, 716 N.W.2d 845. "[A] parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent." *Id.* ¶ 49. In *Jodie W.*, the court further concluded that "a parent's failure to fulfill conditions of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." *Id.*

The courts have limited the application of *Jodie W.* For example, the court of appeals rejected a mother's claim that because her cognitive delays allegedly prevented completion of the CHIPS conditions for safe return of her children, [Wis. Stat.](#) § 48.415(2) violated her due-process rights. *State v. Ebony D. (In re Termination of Parental Rts. to Ka'Dejah P.)*, Nos. 2013AP619, 2013AP620, 2013AP621, 2013 WL 3186417 (Wis. Ct. App. June 25, 2013) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)). The court determined that the parent's poor actions and choices, not her cognitive delays, accounted for her inability to meet the CHIPS conditions. The court of appeals made a similar determination in *State v. T.S.R. (In re Termination of Parental Rts. to T.S.J.)*, No. 2017AP548, 2018 WL 1402164, ¶¶ 32–46 (Wis. Ct. App. Mar. 20, 2018) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)), when it rejected a mother's arguments that her mental illness made it impossible for her to meet the conditions for return of her child.

Sixth, if the child has been placed outside the home for less than 15 of the most recent 22 months, a substantial likelihood exists that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home. [Wis. Stat.](#) § 48.415(2)(a)3., as amended by 2017 Wis. Act 256 (eff. Apr. 6, 2018) (eliminating prior language referring to likelihood of meeting conditions within 9 months after TPR fact-finding hearing).

**Note.** The Wisconsin Court of Appeals has ruled that it is not unconstitutional to prosecute a TPR case under the law as amended by 2017 Wis. Act 256, even if the underlying CHIPS case originated under the law before the amendment. See, e.g., *Dane Cnty. Dep't of Hum. Servs. v. J.R. (In re Termination of Parental Rts. to K.T.)*, [2020 WI App 5](#), 390 Wis. 2d 326, 938 N.W.2d 614.

To establish that a child is in continuing need of protection or services under [Wis. Stat.](#) § 48.415(2)(am), justifying termination of parental rights, the petitioner must prove the following elements by clear and convincing evidence.

First, the child has, on three or more occasions, been adjudicated to be in need of protection or services under [Wis. Stat.](#) § 48.13(3), (3m), (10), or (10m). [Wis. Stat.](#) § 48.415(2)(am)1.

Second, in connection with each of these adjudications, the child has been placed outside the home pursuant to a valid CHIPS order. [Wis. Stat.](#) § 48.415(2)(am)1.

Third, the orders placing the child outside the home contained the required written TPR warnings. *Id.*

Fourth, the conditions that led to the child's placement outside the home were caused by the parent. [Wis. Stat.](#) § 48.415(2)(am)2.

## E. Continuing Parental Disability [§ 17.19]

To prove continuing parental disability as grounds for terminating parental rights, the petitioner must show the following elements by clear and convincing evidence.

First, because of mental illness, developmental disability, or other like incapacities, the parent is and, for a cumulative total period of at least two years within the five years immediately before the filing of the petition, has been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities. [Wis. Stat.](#) § 48.415(3)(a).

**Note.** [Wis. Stat.](#) § 51.01(13) defines *mental illness*. [Wis. Stat.](#) § 55.01(2) and (5) define *developmental disability* and *other like incapacities* in the context of protective placement. The definition of *hospital* appears in [Wis. Stat.](#) § 50.33(2). [Wis. Stat.](#) § 51.01(2) defines an *approved treatment facility*. [Wis. Stat.](#) § 51.01(15) defines a *state treatment facility*.

Second, the parent's condition will likely continue indefinitely. [Wis. Stat.](#) § 48.415(3)(b).

Third, a relative having legal custody of the child, a parent, or a guardian is not providing the child with adequate care. [Wis. Stat. § 48.415\(3\)\(c\)](#).

## F. Continuing Denial of Periods of Physical Placement or Visitation [§ 17.20]

The petitioner can establish continuing denial of periods of physical placement or visitation, as a ground for TPR, by presenting clear and convincing evidence of the following.

First, a court order has denied the parent periods of physical placement in an action affecting the family, *see* [Wis. Stat. § 767.001\(5\)](#) (defining *physical placement*), or the parent has been denied visitation under a CHIPS, UCHIPS, or JIPS dispositional order, [Wis. Stat. §§ 48.345, 938.345](#), revised dispositional order, [Wis. Stat. §§ 48.363, 938.363](#), or extended dispositional order, [Wis. Stat. §§ 48.365, 938.365](#), containing the notice required under [Wis. Stat. § 48.356\(2\)](#) or [Wis. Stat. § 938.356\(2\)](#). [Wis. Stat. § 48.415\(4\)\(a\)](#).

**Note.** Family court orders need not contain the notice under [Wis. Stat. § 48.356\(2\)](#) or [Wis. Stat. § 938.356\(2\)](#). Those notices are required for juvenile court orders. *Kimberly S.S. v. Sebastian X.L. (In re Termination of Parental Rts. to Jillian K.L.)*, [2005 WI App 83](#), ¶ 7, 281 Wis. 2d 261, 697 N.W.2d 476.

**Caution.** Defense counsel should carefully review the order denying visitation to make sure the order is subject to a valid dispositional order and meets all requirements for notice as required by [Wis. Stat. §§ 48.356\(2\), 938.356\(2\)](#).

Second, at least one year has elapsed since the court issued the order denying periods of physical placement or visitation and the court has not subsequently modified its order so as to permit periods of physical placement or visitation. [Wis. Stat. § 48.415\(4\)\(b\)](#).

**Practice Tip.** It is important to determine why the court has denied periods of physical placement. The parent's attorney should look at the original transcript denying the periods of physical placement. If the reason for the denial was solely the parent's incarceration, the parent may file a motion to dismiss using the rationale in *Kenosha County Department of Human Services v. Jodie W. (In re Termination of Parental Rights to Max G.W.)*, [2006 WI 93](#), ¶ 49, 293 Wis. 2d 530, 716 N.W.2d 845.

## G. Child Abuse [§ 17.21]

To prove child abuse as a basis for terminating parental rights, the petitioner must prove by clear and convincing evidence that the parent has exhibited a pattern of abusive behavior that substantially threatens the child's health, [Wis. Stat. § 48.415\(5\)](#), and either one of the following:

1. The parent has caused death or injury to a child or children, resulting in a felony conviction. [Wis. Stat. § 48.415\(5\)\(a\)](#).
2. The child has previously been removed from the parent's home pursuant to a CHIPS dispositional order, [Wis. Stat. § 48.345](#); *see also supra ch. 11* (discussion of dispositional proceedings in CHIPS cases), after an adjudication that the child was in need of protection or services because of abuse or substantial risk of abuse. [Wis. Stat. § 48.415\(5\)\(b\)](#); *see also* [Wis. Stat. § 48.13\(3\), \(3m\)](#). To find a child to be in need of protection or services based on child abuse under [Wis. Stat. § 48.13\(3\)](#), the trier of fact need not find that the parent caused the abuse by the parent's act or omission, but only that the abuse occurred by other-than-accidental means. *See* [Wis. Stat. § 48.02\(1\)\(a\)](#) (defining *abuse*).

## H. Failure to Assume Parental Responsibility [§ 17.22]

Failure to assume parental responsibility can be established by proof that the parent (or the person who might be the parent) of the child has not had a substantial parental relationship with the child. [Wis. Stat. § 48.415\(6\)\(a\)](#).

[Wis. Stat. § 48.415\(6\)\(b\)](#) defines a *substantial parental relationship* as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." In determining whether a substantial parental relationship exists, the court can consider whether the person has expressed concern for or interest in the support, care, or well-being of the child or the mother during her pregnancy, and whether the person has neglected or refused to provide care and support for the child. [Wis. Stat. § 48.415\(6\)\(b\)](#). Of course, the court can consider any other relevant evidence and can consider factors other than those set forth in the statute. *See id.* This determination requires the trier of fact to look at the totality of the circumstances and consider all the circumstances throughout the child's entire life. *Tammy W-G. v. Jacob T. (In the Int. of Gwenevere T.)*, [2011 WI 30](#), ¶ 22, 333 Wis. 2d 273, 797 N.W.2d 854. The legislature has explicitly rejected narrowing the trier's analysis to a specific time period and instead has kept the relevant period as broad as possible. *Id.*



¶ 27. A parent's lack of opportunity to establish a substantial relationship is not a defense to an allegation that a parent failed to assume parental responsibility, but "the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis." *Id.* ¶ 38.

If the biological father was unaware that he was the father until after the petition for termination was filed, the court must consider the biological father's efforts to assume parental responsibility after he discovered he was the father but before the circuit court adjudicates the grounds for TPR. *State v. Bobby G. (In re Termination of Parental Rts. to Marquette S.)*, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81.

**Comment.** The supreme court held that in cases in which the father has failed to establish a substantial parental relationship with the child, the Due Process Clause does not require a finding of unfitness before the court terminates the father's parental rights. *L.K. v. B.B. (In the Int. of Baby Girl K.)*, 113 Wis. 2d 429, 447–48, 335 N.W.2d 846 (1983). The court decided this case before the enactment of [Wis. Stat.](#) § 48.424(4), which requires the court to find the parent unfit if the trier of fact finds that the petitioner has proved grounds for termination. See 1987 Wis. Act 383. A parent who lacks a substantial parental relationship with a child does not have a constitutionally protected interest in the parent's relationship with the child. *L.K.*, 113 Wis. 2d at 444–45 (citing *Lehr v. Robertson*, 463 U.S. 248 (1983)). The supreme court also held that the statute then in effect did not violate the Equal Protection Clause.

## I. Incestuous Parenthood [§ 17.23]

The petitioner must prove by clear and convincing evidence the parent's relationship, either by blood or by adoption, to the child's other parent in a degree of kinship closer than second cousin. [Wis. Stat.](#) § 48.415(7). This ground does not apply, however, to terminate the parental rights of a mother who was the minor victim of an incestuous relationship with her father. *Monroe Cnty. Dep't of Hum. Servs. v. Kelli B. (In re Termination of Parental Rts. to Zachary B.)*, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831.

## J. Homicide or Solicitation to Commit Homicide of Parent [§ 17.24]

The court can terminate a parent's rights if the petitioner proves by clear and convincing evidence the parent's conviction of first- or second-degree intentional homicide, see [Wis. Stat.](#) §§ 940.01, 940.05, first-degree reckless homicide, see [Wis. Stat.](#) § 940.02, or solicitation to commit first-degree intentional homicide, see [Wis. Stat.](#) § 939.30, when the victim or intended victim is the other parent. [Wis. Stat.](#) § 48.415(8). Comparable crimes under federal law or laws of another state are also included under this section. Whether under Wisconsin law, federal law, or the law of another state, a parent's conviction may be evidenced by a final judgment of conviction. *Id.*

## K. Parenthood as a Result of Sexual Assault [§ 17.25]

If the petitioner proves, either by a judgment of conviction or other evidence, that the person who might be the father of the child committed a sexual assault on the mother of the child during the possible time of conception, this proof can be a basis for terminating the person's parental rights. [Wis. Stat.](#) § 48.415(9)(a). Under this subsection, *sexual assault* is defined as first-, second-, or third-degree sexual assault, in violation of [Wis. Stat.](#) § 940.225(1), (2), or (3); first- or second-degree sexual assault of a child, in violation of [Wis. Stat.](#) § 948.02(1) or (2); repeated sexual assault of a child, in violation of [Wis. Stat.](#) § 948.025; or sexual assault of a child placed in substitute care under [Wis. Stat.](#) § 948.085. The sexual assault must be proved either by a final judgment of conviction or by evidence from a fact-finding hearing that the person whose rights are sought to be terminated sexually assaulted the mother of the child during the conceptive period. [Wis. Stat.](#) § 48.415(9)(a).

In an unpublished opinion, the court of appeals made it clear that the parental rights of the sexual assault victim cannot be terminated based on this section. *La Crosse Cty. Dep't of Human Servs. v. Stacey A.M. (In re Termination of Parental Rts. to Quianna M.M.)*, No. 01-1723, 2001 WL 1046974 (Wis. Ct. App. Sept. 13, 2001) (unpublished opinion not citable per [Wis. Stat.](#) § 809.23(3)) (holding that [Wis. Stat.](#) § 48.415(9) may only be applied to a man who fathers a child conceived as a result of the man's sexual assault of the child's mother).

## L. [Commission of a Felony Against a Child](#) [§ 17.26]

Commission by the parent of a felony against a child can be a basis for terminating the person's parental rights as to any of the parent's children. [Wis. Stat.](#) § 48.415(9m). This ground can be proved by evidence of a final judgment of conviction that the parent committed against one of the parent's children a *serious felony*, as defined under [Wis. Stat.](#) § 48.415(9m)(b). [Wis. Stat.](#) § 48.415(9m)(a); see *Reynaldo F. v. Christal M. (In re Termination of Parental Rts. to Reynaldo F.)*, 2004 WI App 106, ¶ 13, 272 Wis. 2d 816, 681 N.W.2d 289 (holding that when parent's pending appeal does not raise issues of guilt or innocence, term *final judgment of conviction*, used in [Wis. Stat.](#) § 48.415(9m), means judgment of conviction entered by circuit court, after "verdict of guilty by the jury, a finding of guilty by the court in

cases where a jury is waived, or a plea of guilty or no contest”) (quoting [Wis. Stat. § 972.13\(1\)](#)). [Wis. Stat. § 48.415\(9m\)](#) can also be used as a ground for TPR if the parent committed against *any* child a violation of [Wis. Stat. § 948.051](#) (child trafficking). [Wis. Stat. § 48.415\(9m\)](#) (am).

## M. Prior Termination of Parental Rights to Another Child [§ 17.27]

Under [Wis. Stat. § 48.415\(10\)](#), the fact that the court has terminated a person’s parental rights to one child can be the basis for seeking termination of the parent’s rights to another child, but only if the petitioner proves the following facts: First, the petitioner must prove that the child who is the subject of the petition has been adjudged to be in need of protection or services based on abandonment, [Wis. Stat. § 48.13\(2\)](#), abuse, [Wis. Stat. § 48.13\(3\)](#), or neglect, [Wis. Stat. § 48.13\(10\)](#), or that the child was born after a petition seeking TPR to a sibling was filed. [Wis. Stat. § 48.415\(10\)\(a\)](#). Second, the petitioner must prove that the court has ordered termination of the person’s parental rights as to another child within the past three years based on one of the grounds under [Wis. Stat. § 48.415](#), or that the court ordered TPR of a sibling within three years before the birth of the subject child. [Wis. Stat. § 48.415\(10\)\(b\)](#).

The second element does not require proof of the specific ground that was relied on for the prior TPR. The petitioner need only prove that the prior TPR was involuntary. *Oneida Cnty. Dep’t of Soc. Servs. v. Nicole W. (In re Termination of Parental Rts. to Brianca M.W.)*, 2007 WI 30, ¶¶ 2, 36, 299 Wis. 2d 637, 728 N.W.2d 652. If the prior TPR order was based on a default for failure to comply with a court order to personally appear at the fact-finding hearing, it cannot be collaterally attacked. *Id.*

## IV. Procedure [§ 17.28]

### A. In General [§ 17.29]

Venue for involuntary TPR cases involving a child placed outside the home pursuant to a CHIPS or UCHIPS dispositional order lies in the county where the court issued the dispositional order, unless the child’s county of residence has changed or the child’s parent has resided in a different Wisconsin county for six months. [Wis. Stat. § 48.185\(2\)](#). Upon motion and for good cause shown, the juvenile court can transfer the case to the current county of residence of the child or parent. *Id.* Venue in adoption proceedings under [Wis. Stat. § 48.837](#) lies in the county where the adoptive parents or the child resides, or in the county where a petition for TPR for the child was filed or granted. *See Wis. Stat. § 48.83*. *But see Wis. Stat. § 48.028(3)(b)* (describing exclusive tribal jurisdiction under WICWA). The supreme court has held that [Wis. Stat. § 48.837](#), which combines termination of parental rights and adoptive placement, permits venue under either [Wis. Stat. § 48.837](#) or [Wis. Stat. § 48.185\(2\)](#). *David S. v. Laura S. (In the Int. of Brandon S.S.)*, 179 Wis. 2d 114, 153, 507 N.W.2d 94 (1993).

Proceedings for terminating parental rights are bifurcated. At the fact-finding hearing, the trier of fact determines whether grounds for termination exist. (See also sections [17.64–69](#), *infra*, for additional considerations in cases involving Indian children.) At disposition, the court decides whether to terminate parental rights. *Waukesha Cnty. Dep’t of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, 124 Wis. 2d 47, 60, 368 N.W.2d 47 (1985). The court must find the parent unfit if one or more statutory grounds have been proved by clear and convincing evidence. *Sheboygan Cnty. Dep’t of Health & Hum. Servs. v. Julie A.B. (In re Termination of Parental Rts. to Prestin T.B.)*, 2002 WI 95, 225 Wis. 2d 170, 648 N.W.2d 402.

### B. Filing the Petition

#### [§ 17.30]

A TPR proceeding commences with the filing of a petition alleging one or more of the grounds specified in [Wis. Stat. § 48.415](#) or asserting that the parent will consent to termination. [Wis. Stat. § 48.42\(1\)\(c\)](#); *see also infra* § [17.62](#) (discussion of voluntary termination of parental rights). The person or agency filing the petition is called the *petitioner*. The filing of the petition can originate with the child’s parent, an agency, or a person authorized to file a petition under [Wis. Stat. § 48.25](#) (i.e., the district attorney, the corporation counsel, or the counsel or guardian ad litem for a parent, relative, guardian, or child, *see Wis. Stat. § 48.25(1)*). [Wis. Stat. § 48.42\(1\)](#). ([Wis. Stat. § 48.42\(1\)](#)) also permits the filing of a petition by a person authorized under [Wis. Stat. § 48.835](#). As noted in section [17.1](#), *supra*, however, this chapter does not deal with terminations sought under [Wis. Stat. § 48.835](#).) A person who knows the facts alleged or has learned of the facts alleged and believes them to be true must sign the petition. [Wis. Stat. § 48.25\(1\)](#).

[Wis. Stat. § 48.42\(1\)](#) dictates that the following shall be included, with specificity, in the petition:

- (a) The name, birth date or anticipated birth date, and address of the child and whether the child has been adopted.
- (b) The names and addresses of the child’s parent or parents, guardian and legal custodian.
- (bm) The information required under s. 822.29(1).

(c) One of the following:

1. A statement that consent will be given to termination of parental rights as provided in s. 48.41.
2. A statement of the grounds for involuntary termination of parental rights under s. 48.415 and a statement of the facts and circumstances which the petitioner alleges establish these grounds.

(d) A statement of whether the child may be subject to the federal Indian Child Welfare Act, 25 USC 1901 to 1963, and, if the child may be subject to that act, the names of the child's Indian custodian, if any, and tribe, if known.

(e) If the petition is seeking the involuntary termination of parental rights to an Indian child, reliable and credible information showing that continued custody of the Indian child by the Indian child's parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028(4)(e)1. and reliable and credible information showing that active efforts under s. 48.028(4)(e)2. have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

[Wis. Stat.](#) § 48.42.

**Note.** Attorneys should keep in mind that [Wis. Stat.](#) § 48.25 governs all petitions filed under the Children's Code. This includes TPR petitions.

Under [Wis. Stat.](#) § 48.42(1g), if a TPR is sought by a person or agency other than the district attorney, corporation counsel, or other appropriate agency *and* the mother is consenting to TPR, the petitioner may file an affidavit with the petition to terminate the rights of a person who "may be the father of a nonmarital child who is under one year of age at the time the petition is filed." The affidavit must be signed by the mother, and it must contain all the information required under [Wis. Stat.](#) § 48.42(1g)(a). The mother signing such an affidavit would be subject to sanctions for making a false statement in a TPR proceeding. [Wis. Stat.](#) § 48.42(5). If such an affidavit is filed, the petitioner must notify any man identified in the affidavit of (1) his right to file a declaration of paternal interest under [Wis. Stat.](#) § 48.025 before the child's birth, within 14 days after the child's birth, or within 21 days after the date on which notice is mailed, whichever is later; (2) the child's birth date or anticipated birth date; and (3) the consequences of filing or not filing a declaration of paternal interest. [Wis. Stat.](#) § 48.42(1g)(b).

**Note.** Under [Wis. Stat.](#) § 48.025, any person claiming paternity of a nonmarital child who is not adopted or whose parents do not subsequently intermarry and whose paternity has not been established can file a declaration of interest with the state Department of Children and Families (DCF)—that is, a statement that he has reason to believe that he might be the child's father.

The petition seeking termination of parental rights must contain a statement of facts and circumstances in support of the grounds alleged for termination. [Wis. Stat.](#) § 48.42(1)(c)2.

The same principles governing the sufficiency of criminal complaints apply in determining the sufficiency of petitions in juvenile court proceedings, including TPR cases. *Sheboygan Cnty. v. D.T. (In the Int. of L.A.T.)*, 167 Wis. 2d 276, 283, 481 N.W.2d 493 (Ct. App. 1992). The 14th Amendment requires that petitions, like criminal complaints, include information sufficiently specific to provide notice and the opportunity to defend against the allegations. A TPR petition, like a criminal complaint, must contain the jurisdictional grounds and supporting facts that will permit the parent to plead and prepare a defense. *Cf. Hamling v. United States*, 418 U.S. 87, 117 (1984) (criminal indictment).

The petition should recite the "five Ws" used by journalists in writing lead paragraphs to news stories: what allegedly happened to justify termination, whose rights the petitioner seeks to terminate, when and where the basis for termination allegedly took place, and why the petitioner seeks this termination. *D.T.*, 167 Wis. 2d at 283. *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 229–30, 161 N.W.2d 369 (1968). The supreme court has added a sixth "W": who makes the allegation. *Evanow*, 40 Wis. 2d at 230. In short, the pleading must recite the essential facts constituting the basis for the action. *Id.* at 229.

**Practice Tip.** Counsel should raise any challenges to the sufficiency of a petition at the first opportunity (i.e., at the initial appearance) and should renew any challenges at each court appearance. A failure to challenge the sufficiency of a petition can waive the right to do so. Waiver of challenges to the sufficiency of the petition also occurs if the parent admits to the allegations in the petition. *See generally supra ch. 7* (challenges to sufficiency of petition).

## C. Notice [§ 17.31]

### 1. In General [§ 17.32]

[Wis. Stat.](#) § 48.42(2), (2g), (3), (2m), and (4) govern service of the summons and petition in TPR proceedings.

**Note.** WICWA provides specific notice requirements if an Indian child is involved. Notice of the first proceeding must be given to the Indian child's parent, Indian custodian, and tribe by registered mail, return receipt requested, and must give notice of the pending proceeding and their right to intervene in the proceedings. [Wis. Stat.](#) §§ 48.028(4)(a), 48.42(2g)(ag). If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, the notice instead must be given to the U.S. Secretary of the Interior. [Wis. Stat.](#) § 48.42(2g)(ag).

## 2. Who Must Be Served [§ 17.33]

[Wis. Stat.](#) § 48.42(2) lists those parties on whom the petitioner must serve a summons and the petition. Only those listed individuals are parties to the action and have standing to participate in proceedings. *David S. v. Laura S. (In the Int. of Brandon S.S.)*, 179 Wis. 2d 114, 507 N.W.2d 94 (1993). *Brandon S.S.* was a TPR case brought pursuant to [Wis. Stat.](#) § 48.837. The supreme court held, in part, that only those individuals required to receive notice under [Wis. Stat.](#) § 48.837 are parties and that [Wis. Stat.](#) § 48.27(6), which requires notice to all interested parties, does not apply. Based on this rationale, only those individuals listed under [Wis. Stat.](#) § 48.42(2) are parties in TPR cases brought under [Wis. Stat.](#) § 48.415. *See also* [Wis. Stat.](#) § 48.42(2g)(am) (stating that foster parents and other physical custodians do not become parties solely because they received notice under [Wis. Stat.](#) § 48.42(2g)(a)). *But see* [Wis. Stat.](#) § 48.028(4)(a) (providing that Indian child's parent, Indian custodian, and tribe have right to intervene in TPR proceeding). If the parent is incarcerated, [Wis. Stat.](#) § 302.025 applies and requires that persons incarcerated in a prison be personally served by the warden or the superintendent or by someone appointed by the warden or the superintendent to serve process.

The petitioner must serve the following:

1. The child's parent or parents, unless the parent has waived the right to notice under [Wis. Stat.](#) § 48.41(2)(d), which allows waiver in voluntary TPR proceedings in which either the stepparent files the petition or the birth parent resides in a foreign jurisdiction, [Wis. Stat.](#) § 48.42(2)(a);
2. Any individual who has filed an unrevoked declaration of paternal interest under [Wis. Stat.](#) § 48.025 before the child's birth or within 14 days after the child's birth; any individual alleged to the court to be the child's father (unless that individual has waived the right to notice); and any person who has lived in a familial relationship with the child and who might be the child's father, if the child is a nonmarital child who is not adopted, whose parents do not subsequently marry, and as to whom paternity has not been established, [Wis. Stat.](#) § 48.42(2)(b);
3. If the child is a nonmarital child who is not adopted, whose parents do not subsequently marry, and as to whom paternity has not been established, and if the child is under one year of age at the time the petition is filed and an affidavit under [Wis. Stat.](#) § 48.42(1g)(a) has been filed with the petition, *see supra* § 17.30, (a) any individual who has filed an unrevoked declaration of paternal interest under [Wis. Stat.](#) § 48.025 before the child's birth, within 14 days after the child's birth, or within 21 days after the petitioner has mailed notice under [Wis. Stat.](#) § 48.42(1g)(b), *see supra* § 17.30, whichever is later; and (b) any person who has lived in a familial relationship with the child and who might be the child's father, [Wis. Stat.](#) § 48.42(2)(bm);
4. The child's guardian, guardian ad litem, legal custodian, and Indian custodian, [Wis. Stat.](#) § 48.42(2)(c);
5. Any person who claims a right to legal custody, physical placement, or visitation under the Uniform Child Custody Jurisdiction and Enforcement Act, *see* [Wis. Stat.](#) ch. 822, except foster parents, [Wis. Stat.](#) § 48.42(2)(d); and
6. The child, if 12 years of age or older, [Wis. Stat.](#) § 48.42(2)(e).

A person who might be the father of a child conceived as a result of a sexual assault does not have a right to notice if a physician attests to the belief that a sexual assault has occurred or if the person has been convicted of sexual assault for conduct that might have led to the child's conception, [Wis. Stat.](#) § 48.42(2m)(a). The supreme court has noted that the physician need attest to the *age* of the victim only in cases of "purely statutory" sexual assault (that is, those cases of sexual assault based solely on the victim's legal incapacity to consent). *Ann M.M. v. Rob S. (In re Termination of Parental Rts. to SueAnn A.M.)*, 176 Wis. 2d 673, 678 n.4, 500 N.W.2d 649 (1993). [Wis. Stat.](#) § 48.42(2m)(a) does not apply if the person who might be the father of a child conceived as the result of a sexual assault under [Wis. Stat.](#) § 948.02(1) or (2) was under 18 years of age at the time of the assault. Under these circumstances, although the petitioner must still prove a ground for terminating parental rights, the father does not have standing to appear and contest the petition, present evidence relevant to the disposition of the case, or make alternative dispositional recommendations. *Id.* at 681. The supreme court has upheld the constitutionality of this statute. *Id.* at 685–88.



**Comment.** In her dissent in *Ann M.M.*, Justice Abrahamson noted the inherent contradiction in permitting termination without notice to the father while allowing termination only after the petitioner has proved grounds at a court hearing. *Id.* at 692 (Abrahamson, J., dissenting).

### 3. Others Entitled to Notice [§ 17.34]

The petitioner must also notify any foster parent or physical custodian of the child, of all hearings on the petition. [Wis. Stat.](#) § 48.42(2g) (a). The first notice must be in writing and include a copy of the petition as well as the nature, location, date, and time of the initial hearing. *Id.* After the first notice, notice may be made by telephone at least 72 hours before the time of the hearing. *Id.* Even though foster parents and physical custodians have the right to notice, they are not parties to the proceedings. [Wis. Stat.](#) § 48.42(2g)(am). Moreover, failure to give notice does not deprive the court of jurisdiction. [Wis. Stat.](#) § 48.42(2g)(b). If notice is not given to these individuals, the foster parent or physical custodian may request a rehearing, which the court must hold, before the entry of an order either dismissing the petition or terminating the parental rights of one or both parents. *Id.*

### 4. Contents of Summons [§ 17.35]

The summons required for parties, *see* [Wis. Stat.](#) § 48.42(2); *see also supra* § 17.33, must contain the child's name and birth date (or anticipated birth date) and the nature, location, date, and time of the initial hearing. [Wis. Stat.](#) § 48.42(3)(a). The summons must advise the party, if applicable, of the right to counsel regardless of ability to pay. [Wis. Stat.](#) § 48.42(3)(b). The summons must advise the parties of the possible result of the hearing and of the consequences of failing to appear or respond. [Wis. Stat.](#) § 48.42(3)(c). Finally, the summons must advise the parties that to avoid waiver of the right to appeal if the court terminates parental rights, an affected party must file within 30 days after the TPR order a notice of intent to pursue postdispositional relief. [Wis. Stat.](#) § 48.42(3)(d).

Parties must receive personal service of the summons and petition at least seven days before the date of the hearing. [Wis. Stat.](#) § 48.42(4) (a). Service of the summons need not occur if the party submits to the jurisdiction of the court (e.g., appears voluntarily for the hearing). *Id.* [Wis. Stat.](#) § 801.11 governs service on parties who are not natural persons or who are persons under a disability.

### 5. Service by Publication [§ 17.36]

The petitioner can effect service by publication of the notice in certain circumstances—for example, (1) if, after reasonable diligence, a party cannot be personally served, [Wis. Stat.](#) § 48.42(4)(b)1.; (2) if the child's custody was relinquished under [Wis. Stat.](#) § 48.195, Wisconsin's safe-haven law, [Wis. Stat.](#) § 48.42(4)(b)1m.; or (3) if the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry and for whom paternity has not been conclusively established by genetic test results, acknowledged, or adjudicated, [Wis. Stat.](#) § 48.42(4)(b)2.

[Wis. Stat.](#) ch. 985 governs the publication of legal notices. Under [Wis. Stat.](#) § 48.42(4)(b)4., the publication must be a class 1 notice. Under [Wis. Stat.](#) § 985.07(1), a class 1 notice requires one insertion. The petitioner must publish the legal notice in a newspaper likely to give notice. [Wis. Stat.](#) § 985.02(1). In determining which newspaper is appropriate, the petitioner or court must consider the residence of the party, if known; the residence of the party's relatives, if known; or the last-known location of the party. [Wis. Stat.](#) § 48.42(4)(b)4. If the petitioner knows or, with due diligence, can determine the party's last-known post office address, the petitioner must mail a copy of the summons and petition to that address upon or immediately before the first publication of the notice. *Id.*

The legal notice must include information identifying the case: the court file number; the date, place, and circuit court branch for the hearing; and the name, address, and telephone number of the petitioner's attorney. *Id.*

The notice must also advise parties of all the following:

1. The failure of a parent or alleged parent to appear might result in the termination of that person's parental rights.
2. The party has a right to have an attorney present and the right to an attorney appointed by the State Public Defender's Office if the party is financially eligible.
3. If the court terminates parental rights, an affected party must file within 30 days after the TPR order a notice of intent to pursue postdispositional relief, or the right to appeal is waived.

[Wis. Stat.](#) § 48.42(4)(c)1., 2., 3.; *see also* [Wis. Stat.](#) § 808.04(7m).

Finally, the notice must contain any other information the court determines necessary to give effective notice to the party, including the following:

1. The name of the party or parties receiving notice;
2. A description of the party or parties;
3. The former address of the party or parties;
4. The approximate date and place of the child's conception; and
5. The date and place of the child's birth.

[Wis. Stat.](#) § 48.42(4)(b)4.

The notice must not include the name of the mother unless the mother consents. [Wis. Stat.](#) § 48.42(4)(b)5. The notice must not contain the child's name unless the court determines that the notice must include this information to give effective notice to the party. *Id.*

## D. Time Periods

### [§ 17.37]

**Note.** Under both [Wis. Stat.](#) chs. 48 and 938, “[f]ailure ... to act within any time period ... does not deprive the court of personal or subject-matter jurisdiction or of competency to exercise that jurisdiction.” [Wis. Stat.](#) §§ 48.315(3), 938.315(3). Furthermore, failure to object to a period of delay or a continuance waives any challenge to the court's competency to act during the period of delay or continuance. [Wis. Stat.](#) §§ 48.315(3), 938.315(3). If the court or a party fails to act within an applicable statutory time period, the court may order any of the following: dismissal without prejudice, release of the child from secure or nonsecure custody or from the terms of a custody order, and any other relief that the court considers appropriate, [Wis. Stat.](#) §§ 48.315(3), 938.315(3). In addition, in [Wis. Stat.](#) ch. 938 cases, courts may dismiss a petition with prejudice. [Wis. Stat.](#) § 938.315(3). This remedy is not available under [Wis. Stat.](#) ch. 48. See [Wis. Stat.](#) § 48.315(3); see also 2007 Wis. Act 199.

The court must hold the initial hearing on the petition within 30 days after the petition is filed. [Wis. Stat.](#) § 48.422(1).

If the petition is contested, the court must set the fact-finding hearing for a date within 45 days from the initial hearing on the petition, unless all parties agree to commence with the hearing on the merits immediately. [Wis. Stat.](#) § 48.422(2).

If the trier of fact finds grounds for termination, the court must proceed immediately to hear evidence and motions relevant to disposition unless (1) all parties agree to defer the disposition to a date no more than 45 days from the fact-finding hearing, or (2) the court has not received a court report and the court asks for one to be prepared. [Wis. Stat.](#) § 48.424(4). If a court determines that a parent has waived the right to appear by counsel, then the court must wait at least two days before proceeding to disposition. See [Wis. Stat.](#) §§ 48.424(4), 48.23(2)(b)3.; see also *supra* § 17.7. If the court adjourns the disposition to a later date, the court can transfer the child to an agency for temporary placement until the dispositional hearing. [Wis. Stat.](#) § 48.424(5); see also [Wis. Stat.](#) § 48.028(7)(b), (c), (e) (describing order-of-placement-preference procedures for Indian children).

**Note.** As noted in section 17.32, *supra*, WICWA requires special procedures in TPR cases involving Indian children. The court cannot hold a hearing on the petition until at least 10 days after the Indian child's parent, Indian custodian, and tribe have received notice of the hearing. If the identity or location of the Indian child's parent, Indian custodian, or tribe cannot be determined, and the petitioner instead gives notice to the U.S. Secretary of the Interior, the court must not hold a hearing on the petition until at least 15 days after the secretary's receipt of that notice. If the Indian child's parent, Indian custodian, or tribe requests a continuance, the court must grant up to 20 additional days to enable the requester to prepare for the hearing. [Wis. Stat.](#) § 48.42(2g)(ag).

## E. Initial Hearing on Petition [§ 17.38]

### 1. In General [§ 17.39]



At the initial hearing on the petition, the court must determine whether any party wishes to contest the petition and inform the parties of their right to a jury trial. [Wis. Stat.](#) § 48.422(1). The court must advise the parties that they must make any request for a jury trial before the end of the plea hearing. [Wis. Stat.](#) § 48.422(4). The failure to appear at the initial appearance may act as a waiver of the right to request a jury trial. *State v. Jennifer M. (In re Termination of Parental Rts. to Jenalyn G.)*, No. 2009AP1964, 2010 WL 566369, ¶¶ 19–28 (Wis. Ct. App. Feb. 19, 2010) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

The court must also inform any man alleging paternity of the right to counsel and the applicable burden of proof. [Wis. Stat.](#) § 48.423(1). An alleged father must prove paternity by clear and convincing evidence. *Id.* If paternity is established under [Wis. Stat.](#) § 48.423(1), the person may participate in future proceedings, but only if he has filed a declaration of paternal interest under [Wis. Stat.](#) § 48.42(2)(b) or (bm). If the person is out-of-state, he may participate if he might be the father, paternity has not been established, and he proves all the requirements of [Wis. Stat.](#) § 48.423(2)(a)–(d) by a preponderance of the evidence. These requirements include proof that the person resided outside Wisconsin at the time of or after the child’s conception, that the mother left the other state without notice, that the person attempted to locate the mother by “every reasonable means,” and that the person has complied with all requirements of his state of residence “to protect and preserve his paternal interests in matters affecting the child.”

Any nonpetitioning party (including the child) can request a continuance of the hearing to consult with an attorney about whether to request a jury trial or to request a substitution of judge. [Wis. Stat.](#) § 48.422(5). The court does not, however, have an affirmative duty to advise parties of the right to a continuance to consult with counsel regarding judicial substitution. *See Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, [2004 WI 47](#), ¶ 50, 271 Wis. 2d 1, 678 N.W.2d 856.

## 2. Court Report [§ 17.40]

Although the court does not order a court report in UCHIPS, CHIPS, JIPS, and delinquency cases until after adjudication, in TPR cases initiated by an agency’s petition, the court must order the agency to file a report at the initial appearance. [Wis. Stat.](#) § 48.422(8). (In a case involving an Indian child, the court may order the agency or request the tribal child welfare department of the Indian child’s tribe to file the report. *Id.*)

The report must include the following:

1. The child’s social history, [Wis. Stat.](#) § 48.425(1)(a);
2. The child’s medical record, including the medical and genetic history of the birth parents; any medical and genetic history provided by the birth parents about the child’s grandparents, aunts, uncles, brothers, and sisters; a report of any medical examination either birth parent had within one year before the date of the petition; the child’s prenatal care and medical condition at birth; the child’s medical and genetic history; and any other relevant medical and genetic information, [Wis. Stat.](#) § 48.425(1)(am);

**Note.** The agency must prepare the medical report within 60 days after the filing of the TPR petition. [Wis. Stat.](#) § 48.425(1m).

3. A statement of the facts supporting the need for termination of parental rights, [Wis. Stat.](#) § 48.425(1)(b);
4. If the child has previously been found to be in need of protection and services, a statement of
  - a. The steps taken by the agency or person responsible for providing services to the parent to remedy the conditions responsible for the court’s intervention, and
  - b. The parent’s response to and cooperation with these services, [Wis. Stat.](#) § 48.425(1)(c);
5. If the child has previously been found to be in need of protection and services and has been placed outside the home, a statement explaining why the child cannot return safely to the family and describing steps taken to effect the child’s return by the agency or person responsible for providing services, *id.*;
6. If a permanency plan has previously been prepared for the child, specific information showing that the agency primarily responsible for providing services to the child has made reasonable efforts to achieve the goal of the child’s permanency plan, including, if appropriate, through an out-of-state placement, [Wis. Stat.](#) § 48.425(1)(c);
7. If the petition is seeking involuntary TPR to an Indian child, specific information showing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and, if the child has previously been

adjudicated in need of protection or services, specific information showing that active efforts have been made to prevent the breakup of the child's family and that those efforts have proved unsuccessful, [Wis. Stat.](#) § 48.425(1)(cm); *see also infra* § 17.67 (discussing findings required for Indian children under [Wis. Stat.](#) § 48.028(4)(e)1. and 2.);

8. A statement of any other appropriate services that might allow the child to return safely home, [Wis. Stat.](#) § 48.425(1)(d);
9. A statement enumerating the best interests of the child standard and related factors of [Wis. Stat.](#) § 48.426(2) and (3) as they apply to the case, [Wis. Stat.](#) § 48.425(1)(e);
10. A statement of the likelihood that the child will be adopted if the report recommends termination of the rights of both of the child's parents or of the child's only living or known parent, [Wis. Stat.](#) § 48.425(1)(f); and

**Note.** Under [Wis. Stat.](#) § 48.425(1)(f), this statement must be prepared by one of the agencies designated in [Wis. Stat.](#) § 48.427(3m) (a)1., 3., 4., or (am): a county department authorized to accept guardianship under [Wis. Stat.](#) § 48.57(1)(e), a child welfare agency licensed to accept guardianship under [Wis. Stat.](#) § 48.61(5), or the DCF. The statement must include a presentation of the factors that might prevent adoption, the factors that might facilitate adoption, and the name of the agency that would assume responsibility for accomplishing the adoption.

11. If the child will not likely be adopted or if adoption would not serve the best interests of the child, a plan for placing the child in a permanent family setting and a recommendation as to the agency that will serve as guardian for the child, [Wis. Stat.](#) § 48.425(1)(g).

The court can waive the report if the parent voluntarily consents to termination under [Wis. Stat.](#) § 48.41. [Wis. Stat.](#) § 48.425(2). In voluntary TPR cases, the court must still order the birth parent or parents to provide the DCF with the medical information listed in [Wis. Stat.](#) § 48.425(1)(am), as described above. *Id.*

When someone other than an agency files a petition, the court must order any parent whose rights may be terminated to file with the court the medical information listed above, [Wis. Stat.](#) § 48.422(9)(a); *see also* [Wis. Stat.](#) § 48.425(1)(am), and the court can order an agency to prepare the same type of report required in cases in which the agency seeks termination, [Wis. Stat.](#) § 48.425(3). If the parent does not provide the medical information ordered by the court, the court must order any health-care provider (as defined in [Wis. Stat.](#) § 146.81(1)(a)–(p)) known to have provided care to the birth parent or parents to provide the court with any health-care records relevant to the child's medical condition or genetic history. [Wis. Stat.](#) § 48.422(9)(b). Any request for release of drug or alcohol abuse records subject to federal laws must comply with federal regulations regarding the release of that information.

### 3. Determining Paternity [§ 17.41]

If the child is a nonmarital child who is not adopted, whose parents do not subsequently intermarry, and whose paternity has not been established, or for whom a declaration of paternal interest has not been filed within 14 days after the child's birth or within 21 days after the date that notice is mailed to the alleged father of his right to file such a declaration, the court must hear testimony about the paternity of the child to determine whether all interested parties have received notice under [Wis. Stat.](#) § 48.42(2) and (2g)(ag). [Wis. Stat.](#) § 48.422(6)(a). If not all interested parties have received that notice, the court must adjourn the hearing and order service of appropriate notice. *Id.*

If the court determines that an unknown person might be the child's father and that that person has not waived notice, the court must determine whether constructive notice will substantially increase the likelihood of notice to that person. [Wis. Stat.](#) § 48.422(6)(b). If the court finds that constructive notice will substantially increase the likelihood of notice to that person and that the petitioner either has not published notice or did not publish an adequate notice, the court must adjourn the hearing for a period not exceeding 30 days and order the petitioner to give constructive notice. *Id.* If the court finds that constructive notice will not substantially increase the likelihood of notice to that person, the court must order that the hearing proceed. *Id.*

If a man alleges that he fathered the child but has not established paternity, and the man wishes to contest the petition, the court must advise him of his right to counsel and of his burden of proving his paternity by clear and convincing evidence. [Wis. Stat.](#) § 48.423. The court must set a date for a hearing on the issue of paternity, or, if all parties agree, the court can immediately take testimony on the issue of paternity. *Id.* If the court adjudicates paternity and does not terminate parental rights, the court can make and enforce support orders such as those ordered under [Wis. Stat.](#) ch. 767, which governs actions affecting the family, including paternity and support. [Wis. Stat.](#) § 48.422(6)(c).

### 4. Admission to the Petition

## [§ 17.42]

If no one contests the petition, the court must follow the procedures outlined in [Wis. Stat. § 48.422\(7\)](#) before accepting an admission to the petition. Even when a parent does not contest the petition, the court must still take testimony in support of it. [Wis. Stat. § 48.422\(3\)](#). The court must address the parties and determine that the admission is voluntary and made with an understanding of the nature of the acts alleged in the petition and the potential dispositions. [Wis. Stat. § 48.422\(7\)\(a\)](#). The court must establish whether the admission resulted from promises, threats, or other coercion. [Wis. Stat. § 48.422\(7\)\(b\)](#).

The court must advise any unrepresented parties of the benefits of representation, advising that an attorney might discover defenses or mitigating circumstances not apparent to a layperson. *Id.* The court must determine that a factual basis exists for the allegations in the petition. [Wis. Stat. § 48.422\(7\)\(c\)](#). In situations in which a proposed adoptive parent might exist, the court must establish whether the proposed adoptive parent has been identified. [Wis. Stat. § 48.422\(7\)\(bm\)](#). If the proposed adoptive parent is not a relative, the court must order the petitioner to submit a report containing information related to payments made to the birth parents. *Id.*; see also [Wis. Stat. § 48.913\(7\)](#). The court must determine whether any coercive or impermissible payments have been made. [Wis. Stat. § 48.422\(7\)\(bm\)](#); see also [Wis. Stat. § 48.913\(4\)](#). If the court finds that a payment was coercive, it must dismiss the petition or amend the agreement to delete any coercive conditions. [Wis. Stat. § 48.422\(7\)\(bm\)](#). If the court finds that a payment was impermissible, it may dismiss the petition. *Id.* Before accepting the admission of facts in a TPR petition, the court must establish whether any person has coerced a birth parent or any alleged or presumed father of the child in violation of [Wis. Stat. § 48.63\(3\)\(b\)5](#). If the court finds that coercion has occurred under this provision, the court must dismiss the petition. [Wis. Stat. § 48.422\(7\)\(br\)](#).

In articulating the standard for determining the voluntariness of a *consent* to terminate parental rights under [Wis. Stat. § 48.41](#), the supreme court has characterized the *admission* to a petition as one type of voluntary consent. *T.M.F. v. Children's Serv. Soc'y of Wis. (In the Int. of D.L.S.)*, 112 Wis. 2d 180, 185, 332 N.W.2d 293 (1983). Therefore, the same standard of voluntariness applies to consent to termination and to admissions in involuntary TPR proceedings.

To determine whether the parent has given voluntary and informed consent to terminate, the court must ascertain the following:

1. The extent of the parent's education and level of general comprehension;
2. The parent's understanding of the nature of the proceedings and the consequences of termination;
3. The parent's understanding of the role of the guardian ad litem and the parent's right to adversary counsel;
4. Whether any promises or threats induced the parent to make the admission;
5. The nature and extent of the parent's communication with the guardian ad litem, social worker, or other adviser; and
6. The parent's awareness of alternatives to termination of parental rights.

*Id.* at 196–97.

The court in *T.M.F.* did not set forth precisely what was a sufficient colloquy for every case. However, understanding the nature of proceedings in an involuntary TPR case would necessarily include understanding the allegations in the petition (including the grounds for termination) and what the petitioner would have to do to prove the particular grounds by clear and convincing evidence. Under [Wis. Stat. § 48.42\(1\)\(c\)2.](#), a petition for involuntary termination of parental rights must allege one or more of the grounds articulated in [Wis. Stat. § 48.415](#). Under [Wis. Stat. § 48.42\(1\)\(c\)1.](#), a voluntary TPR petition need only contain the assertion that the parent will consent to termination.

In addition, [Wis. Stat. § 48.422\(7\)](#), in part, tracks the language of [Wis. Stat. § 48.30\(8\)](#), which governs admissions in CHIPS and UCHIPS cases. [Wis. Stat. § 938.30\(8\)](#) governs admissions in JIPS and delinquency cases and essentially tracks the language of [Wis. Stat. § 48.30\(8\)](#). See *supra* [ch. 8](#) (discussion of admissions in delinquency, JIPS, and CHIPS, and UCHIPS cases). Both [Wis. Stat. §§ 48.30\(8\)](#) and [938.30\(8\)](#) function as counterparts to [Wis. Stat. § 971.08](#), which governs plea procedures in adult criminal cases and serves to assist the court in “making the constitutionally required determination that a defendant's plea is voluntary.” *State v. Bangert*, 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986); see also *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906; *Kenosha Cnty. Dep't of Hum. Servs. v. Jodie W. (In re Termination of Parental Rts. to Max G.W.)*, 2006 WI 93, ¶¶ 25–38, 293 Wis. 2d 530, 716 N.W.2d 845; *Oneida Cnty. Dep't of Soc. Servs. v. Therese S. (In re Termination of Parental Rts. to Yasmine B.)*, 2008 WI App 159, ¶ 6, 314 Wis. 2d 493, 762 N.W.2d 122. Thus, in cases under the Children's Code and the Juvenile Justice Code, the court needs evidence that the child, parent, or expectant mother

understands the nature of the allegations and possible dispositions for the admission to meet the constitutional standard of voluntariness (in delinquency cases) and the statutory requirements (in CHIPS, UCHIPS, JIPS, and TPR cases). Consequently, the colloquy with the court in a TPR case must demonstrate that the parent makes an admission knowingly, voluntarily, and intelligently. *Bangert*, 131 Wis. 2d at 260.

To ensure that a parent understands the nature of the allegations that the parent admits, the court must, under the standard articulated in *Bangert*, inform the parent of the grounds for termination and the elements of the particular grounds alleged, as well as affirmatively establish that the parent understands the constitutional and statutory rights that the parent waives through admission. *Id.* at 268. Under *Bangert*, the court must determine the extent of the parent's education and general comprehension; the parent's understanding of the possible consequences of the admission; the parent's awareness of the right to an attorney, paid for by the state if the individual is indigent; the parent's awareness of the possibility that an attorney might discover defenses to the allegations; whether any promises or threats induced the parent or child to enter an admission; and that a factual basis exists for the allegations in the petition. *Id.* at 261–62. The standard in *Bangert*, then, comports with the requirements of [Wis. Stat. § 48.422\(7\)](#).

A parent could enter a plea of no contest to the facts in the petition, thereby waiving the right to contest that grounds exist for a TPR. *Brown Cnty. Dep't of Hum. Servs. v. Brenda B. (In re Termination of Parental Rts. to Desmond F.)*, 2011 WI 6, 331 Wis. 2d 310, 795 N.W.2d 730. When a parent enters a no-contest plea, the court then finds the parent unfit, just as with an admission to the grounds alleged in the petition. Since a no-contest plea in the grounds phase does not guarantee that a parent's parental rights will be terminated, the court's colloquy with a parent need only address the rights given up in that phase. *Id.* This is different than if a parent voluntarily consents to the termination of the parent's rights under [Wis. Stat. § 48.41](#). *Id.* ¶¶ 40–44.

## F. Fact-Finding Hearing [§ 17.43]

### 1. In General [§ 17.44]

When a parent contests the petition, the court holds a fact-finding hearing to determine whether grounds exist for terminating parental rights. See [Wis. Stat. § 48.424\(1\)\(a\)](#). (In cases involving Indian children, the fact-finder must also determine whether the allegations specified in [Wis. Stat. § 48.42\(1\)\(e\)](#) have been proved. See [Wis. Stat. § 48.424\(1\)\(b\)](#); see also *infra* § 17.67.) The court acts as fact-finder at the hearing unless the parent, or any other party who is necessary to the proceedings or whose rights may be affected by a TPR order, requested a jury trial at the initial hearing on the petition. See [Wis. Stat. § 48.422\(4\)](#).

The same procedures governing fact-finding hearings in CHIPS and UCHIPS cases, see *supra* [ch. 10](#), apply to TPR fact-finding hearings, with two exceptions: the court can exclude the child from the hearing, and the hearing must be closed to the public. [Wis. Stat. § 48.424\(2\)](#).

In some situations, parents who are not able to personally appear at a TPR hearing may appear by telephonic or audiovisual means. [Wis. Stat. §§ 885.54, 885.56, and 885.60](#) set forth the requirements for an audiovisual appearance under [Wis. Stat. ch. 48](#). [Wis. Stat. § 885.54\(1\)\(c\)](#), for example, provides the following:

Video and sound quality [of videoconferencing technology in the circuit court] shall be adequate to allow participants to observe the demeanor and non-verbal communications of other participants and to clearly hear what is taking place in the courtroom to the same extent as if they were present in the courtroom.

Additional requirements apply specifically in proceedings under [Wis. Stat. ch. 48](#). For example, “a separate private voice communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding,” if they are not otherwise in each other's physical presence. [Wis. Stat. § 885.54\(1\)\(g\)](#). In addition, “counsel for a defendant or respondent [in a [Wis. Stat. ch. 48](#) proceeding] shall have the option to be physically present with the client at the remote location.” [Wis. Stat. § 885.54\(1\)\(e\)](#).

Before the Wisconsin Supreme Court established these procedures for the use of videoconferencing in the circuit courts in 2008, the court of appeals had also provided instructive guidance on appropriate procedures. *Waukesha Cnty. Dep't of Health & Hum. Servs. v. Teodoro E. (In re Termination of Parental Rts. to Adrianna A.E.)*, 2008 WI App 16, ¶¶ 1–19, 307 Wis. 2d 372, 745 N.W.2d 701; *State v. Lavelle W. (In re Termination of Parental Rts. to Idella W.)*, 2005 WI App 266, ¶ 8, 288 Wis. 2d 504, 708 N.W.2d 698; cf. Wis. Sup. Ct. Order 07-12, 2008 WI 37, 305 Wis. 2d xli (eff. July 1, 2008) (creating [Wis. Stat. §§ 885.50–.64](#)). In *Lavelle W.*, for example, the court of appeals stated a rule that arguably resembled [Wis. Stat. § 885.54\(1\)\(c\)](#) and (g):

[A]ny alternative to a parent's personal presence at a proceeding to terminate parental rights *must*, unless the parent knowingly waives this right or the ministerial nature of the proceedings make personal-presence unnecessary, *be functionally equivalent to personal presence*: the parent must be able to



assess the witnesses, confer with his or her lawyer, and, of course, hear *everything* that is going on.

*Lavelle W.*, 2005 WI App 266, ¶ 8, 288 Wis. 2d 504 (vacating TPR order because parent was unable to meaningfully participate in proceedings by use of semi-audible telephone). In *Teodoro E.*, the court of appeals held that a deported father living in Mexico was able to “meaningfully participate” in a TPR hearing by virtue of a Web camera arrangement that allowed the father to see and hear everything in the courtroom and allowed the court to see and hear the father. Counsel for the father was in the courtroom and was also able to communicate with the father privately. In addition, the father had the assistance of a paralegal in Mexico. *Teodoro E.*, 2008 WI App 16, ¶¶ 1–19, 307 Wis. 2d 372.

## 2. Rules of Evidence at Trial [§ 17.45]

The rules of evidence apply at fact-finding hearings in TPR cases. [Wis. Stat.](#) § 48.299(4)(a). Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” [Wis. Stat.](#) § 904.01. The court cannot admit irrelevant evidence. [Wis. Stat.](#) § 904.02. The court can exclude even relevant evidence if its prejudicial effect outweighs its probative value. [Wis. Stat.](#) § 904.03. Generally, the court cannot admit character evidence to show an individual’s propensity to act in a certain manner. [Wis. Stat.](#) § 904.04(1). *But see infra* § 17.61.

The parent’s interest and the State’s interest in termination of parental rights proceedings are both extremely important; the State and parent share an interest in an accurate decision; due process guarantees a parent the opportunity to be heard and present a defense; and the State has no interest in depriving a parent of the right to be heard when evidence is admissible under the rules of evidence.

*Brown Cnty. v. Shannon R. (In re Termination of Parental Rts. to Daniel R.S.)*, 2005 WI 160, ¶ 67, 286 Wis. 2d 278, 706 N.W.2d 269.

## 3. Rules of Civil Procedure in Juvenile Court Proceedings [§ 17.46]

### a. In General [§ 17.47]

[Wis. Stat.](#) chs. 801–847, Wisconsin’s civil procedure statutes, generally apply to juvenile court proceedings, unless a statute or rule prescribes a different procedure. *Waukesha Cnty. Dep’t of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, 124 Wis. 2d 47, 53, 368 N.W.2d 47 (1985). For example, on the one hand, [Wis. Stat.](#) § 48.293(4) specifically provides that discovery procedures under [Wis. Stat.](#) ch. 804 apply in Children’s Code proceedings, including TPR proceedings. On the other hand, because the Children’s Code does not have a specific provision governing jury instructions, the supreme court has held that the procedure set forth in [Wis. Stat.](#) § 805.13(3) for objecting to jury instructions applies to TPR fact-finding hearings. *Id.*; see also *State v. Tammy F. (In Int. of Zachary F.)*, 196 Wis. 2d 981, 539 N.W.2d 475 (Ct. App. 1995).

### b. Summary Judgment [§ 17.48]

In addition, the supreme court has ruled that summary judgment in the unfitness phase of a TPR case is available when the requirements of the summary-judgment statute, see [Wis. Stat.](#) § 802.08, and the applicable legal standards in [Wis. Stat.](#) §§ 48.415 and 48.31 have been met. *Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, 2004 WI 47, ¶ 5, 271 Wis. 2d 1, 678 N.W.2d 856. Counsel should be prepared to address the constitutionality of summary-judgment procedure as applied to the specific facts of the case. The *Steven V.* decision was grounded in procedural-due-process rights. An as-applied, substantive-due-process challenge to summary-judgment proceedings might also be possible. *Dane Cty. Dep’t of Hum. Servs. v. Ponn P. (In re Termination of Parental Rts. to Diana P.)*, 2005 WI 32, ¶ 25 n.6, 279 Wis. 2d 169, 694 N.W.2d 344.

The *Steven V.* court noted that, in many cases, “the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child.” *Steven V. v. Kelley H. (In re Termination of Parental Rts. to Alexander V.)*, 2004 WI 47, ¶ 36, 271 Wis. 2d 1, 678 N.W.2d 856.

**Caution.** In cases with fact-intensive grounds, defense counsel must be prepared to cite specific facts by affidavit to allege the existence of a defense, especially in cases in which abandonment is alleged. See *Brown Cnty. Hum. Servs. v. B.P. (In re Termination of Parental Rts. to A.P.)*, 2019 WI App 18, 386 Wis. 2d 557, 927 N.W.2d 560. If such a defense requires testimony by an expert witness, such as a psychologist or doctor, defense counsel must support its defense at the summary-judgment stage with evidence from such an expert. *Id.* ¶¶ 48–49.

### c. Stipulation to an Element [§ 17.49]

Parties can stipulate to an element for TPR. Typically, the stipulation will address a single, undisputed, “paper” element (i.e., one that can be proved by official documentary evidence, such as a CHIPS adjudication) when another element is the focus of the controversy. The supreme court has stated:

While we do not require it, we urge that circuit courts in TPR proceedings consider personally engaging the parent in a colloquy explaining that a stipulation to an element withdraws that element from the jury’s consideration and determining that the withdrawal of that element from the jury is knowing and voluntary.

*Walworth Cnty. Dep’t of Health & Hum. Servs. v. Andrea L.O. (In re Termination of Parental Rts. to Lyle D.E.)*, [2008 WI 46](#), ¶ 55, 309 Wis. 2d 161, 749 N.W.2d 168. Therefore, a stipulation on a paper element should include the colloquy on the record with the parent. In addition, the documentary evidence supporting that paper element should be made a part of the record, and that evidence must show that the element is “undisputed” and “indisputable.”

In *Manitowoc County Human Services Department v. Allen J. (In re Termination of Parental Rights to Brandon J.)*, [2008 WI App 137](#), 314 Wis. 2d 100, 757 N.W.2d 842, however, the court of appeals declined to apply *Andrea L.O.*’s narrow holding, and reversed for a new trial. (The court distinguished the facts in *Allen J.*, noting that there was no agreement on the record to the stipulation in *Allen J.* and there was insufficient documentary evidence to show that the so-called paper element was undisputed and indisputable in that case. *Id.* ¶¶ 14–15.) Instead of applying *Andrea L.O.*, the court of appeals in *Allen J.* applied the principles of *N.E. v. Department of Health & Social Services (In the Interest of N.E.)*, 122 Wis. 2d 198, 361 N.W.2d 693 (1985) (a delinquency case), and *S.B. v. Racine County (In re S.B.)*, 138 Wis. 2d 409, 406 N.W.2d 408 (1987) (a [Wis. Stat.](#) ch. 51 civil commitment case). In *N.E.* and *S.B.*, the supreme court held that any withdrawal of a jury demand must be made personally, either in writing or in open court. If in writing, the withdrawal must state that the withdrawal is knowing and voluntary, with the advice of counsel. If the withdrawal is done in open court, the court must engage in a colloquy with the parent to ascertain knowingness and voluntariness.

**Caution.** The court of appeals reiterated in 2017 that *Andrea L.O.* only “urge[d]” judges to require personal colloquies with parents but ultimately held that a lack of a colloquy was not reversible error. See *Barron Cnty. Dep’t of Health & Hum. Servs. v. C.K. (In re Termination of Parental Rts. to C.K.)*, Nos. 2016AP1378, 2016AP1379, 2016AP1380, 2017 WL 1325568, ¶¶ 9–18 (Wis. Ct. App. Apr. 11, 2017) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)).

Even if parties do not stipulate to an element, the court can direct a verdict on one or more of the elements under [Wis. Stat.](#) § 805.14(4), on its own motion or on a motion of a party. The court can do so only “where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.” *Door Cnty. Dep’t of Health & Fam. Servs. v. Scott S. (In re Termination of Parental Rts. to Kristeena A.M.S.)*, [230 Wis. 2d 460, 465, 602 N.W.2d 167 \(Ct. App. 1999\)](#).

#### d. [Default for Failure to Appear](#)

##### [§ 17.50]

Parents may face default for failing to appear at the first hearing after receiving proper service or completion of service by publication, for failing to comply with a court order to personally appear at the fact-finding hearing, or for failing to follow other court orders pursuant to [Wis. Stat.](#) §§ 802.10(7), 804.12(2)(a), and 805.03. To order default judgment, the court must find that it is the appropriate sanction for the parent’s egregious or bad-faith violation of the court’s order. See *Evelyn C.R. v. Tykila S. (In re Termination of Parental Rts. to Jayton S.)*, [2001 WI 110](#), ¶ 17, 246 Wis. 2d 1, 629 N.W.2d 768. A parent can be found in default, but the court must still proceed to take sufficient evidence to support a finding by clear and convincing evidence that the elements for the TPR ground(s) are present. If sufficient evidence is not presented at the fact-finding stage, the court can look to the facts adduced at the dispositional phase to determine whether the elements have been proved. *Id.* ¶ 23. An order terminating parental rights based on a default for failure to comply with a court order to personally appear at the fact-finding hearing cannot be collaterally attacked. *Oneida Cnty. Dep’t of Soc. Servs. v. Nicole W. (In re Termination of Parental Rts. to Brianca M.W.)*, [2007 WI 30](#), ¶¶ 26–35, 299 Wis. 2d 637, 728 N.W.2d 652.

**Caution.** If a parent fails to appear for the initial hearing on petition and is found in default as a result, defense counsel should investigate the reasons for the parent’s nonappearance. If appropriate, defense counsel should consider filing a motion to vacate the default judgment, pursuant to [Wis. Stat.](#) §§ 48.46(2), 806.07(1)(a), if the parent’s nonappearance was caused by mistake or excusable neglect.

Defense counsel must be aware of the parent’s right to counsel and the attorney’s ethical obligations to the parent in these circumstances. See *supra* § [17.7](#); see also *State v. Shirley E. (In re Termination of Parental Rts. to Torrance P.)*, [2006 WI 129](#), 298 Wis. 2d 1, 724 N.W.2d 623; *State v. Darrell K. (In re Termination of Parental Rts. to Marquise L.)*, No. 2010AP1910, 2010 WL 4151979 (Wis. Ct. App. Oct. 19,



2010) (unpublished opinion citable for persuasive value per [Wis. Stat.](#) § 809.23(3)(b)). Before the court can render a default judgment against a parent who is represented by counsel, the court must take testimony on the issue of grounds and allow the parent's lawyer to present evidence in a prove-up proceeding. *Dane Cnty. Dep't of Hum. Servs. v. Mable K. (In re Termination of Parental Rts. to Isaiah H.)*, [2013 WI 28](#), ¶ 3, 346 Wis. 2d 396, 828 N.W.2d 198; *see also* [Wis. Stat.](#) § 806.02(5) ("If proof of any fact is necessary for the court to render [a default] judgment, the court shall receive the proof.").

A parent who has appeared with counsel or has been appointed counsel must continue to be represented by counsel unless that parent has made a knowing and voluntary waiver of counsel under [Wis. Stat.](#) § 48.23(2)(b)1. and (4). A court may also find that a parent is presumed to have waived the parent's right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any subsequent hearings in the proceedings, the parent fails to appear in person as ordered, and the court finds that the parent's conduct for failing to appear in person was egregious and without clear and justifiable excuse. [Wis. Stat.](#) § 48.23(2)(b)3. *See* section [17.7](#), *supra*, for more information on the right to counsel and default findings.

If counsel for a parent is not discharged from the case, counsel still has an ongoing obligation to provide zealous advocacy, even if the parent fails to appear at a court hearing or does not communicate with defense counsel. *Shirley E.*, [2006 WI 129](#), ¶¶ 37–39, 298 Wis. 2d 1.

#### 4. Role of the Guardian ad Litem [§ 17.51]

The guardian ad litem represents the interests of the child by helping to develop the facts as they relate to the grounds for termination. *Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W. (In the Int. of C.E.W.)*, [124 Wis. 2d 47](#), 68, 368 N.W.2d 47 (1985); *see also supra* [ch. 3](#) (discussion of role of guardian ad litem in juvenile court proceedings). Case law addressing the role of the guardian ad litem in TPR proceedings has focused on jury selection and closing argument.

[Wis. Stat.](#) chs. 756 and 805 govern jury selection in fact-finding hearings. [Wis. Stat.](#) § 48.31(2). The supreme court has held that under [Wis. Stat.](#) § 805.08(3), the guardian ad litem shares peremptory challenges with whichever party the guardian ad litem aligns—the petitioner or the parent. *C.E.W.*, [124 Wis. 2d](#) at 67.

**Note.** [Wis. Stat.](#) § 805.10 states that “not more than one attorney for each side shall examine or cross-examine a witness.” Therefore, after the guardian ad litem has aligned himself or herself with a party, counsel may want to consider asking the court to limit who conducts the direct and cross-examinations.

A party's right to address the jury on the facts serves as an “important and effective aid to the fact finder in ascertaining the truth.” *Id.* at 68. In holding that [Wis. Stat.](#) § 805.10 applies to TPR fact-finding hearings, the supreme court has further held that the guardian ad litem has the right to argue facts to the jury. *Id.* at 70. The guardian ad litem cannot, however, invoke the best interests of the child in statements to the jury. *Id.* The court of appeals has held that the court can introduce the guardian ad litem as the attorney appointed to represent the best interests of the children. *D.B. v. Waukesha Cnty. Hum. Servs. Dep't (In the Int. of J.A.B.)*, [153 Wis. 2d 761](#), 769–70, 451 N.W.2d 799 (Ct. App. 1989) (noting that *C.E.W.* restricted the guardian ad litem's conduct at trial, not the court's conduct toward the guardian ad litem). Reversible error results only if the court or the guardian ad litem instructs the jury that it should consider the best interest of the child. *Door Cnty. Dep't of Health & Fam. Servs. v. Scott S. (In re Termination of Parental Rts. of Kristeena A.M.S.)*, [230 Wis. 2d 460](#), 469, 602 N.W.2d 167 (Ct. App. 1999).

For more information about the role of the guardian ad litem in TPR proceedings, see Mary Beth Arnett et al., *The Guardian ad Litem Handbook* ch. 4 (State Bar of Wis. 5th ed. 2018 & Supp.).

#### 5. Finding of Unfitness

##### [§ 17.52]

If the trier of fact (whether court or jury) finds that the petitioner has proved by clear and convincing evidence the grounds for termination of parental rights, the court must find the parent unfit. [Wis. Stat.](#) § 48.424(4); *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re Termination of Parental Rts. to Prestin T.B.)*, [2002 WI 95](#), 255 Wis. 2d 170, 648 N.W.2d 402.

In a summary-judgment proceeding under [Wis. Stat.](#) § 48.415(4), there is no requirement that the court find the parent unfit. *Dane Cnty. Dep't of Hum. Servs. v. Ponn P. (In re Termination of Parental Rts. to Diana P.)*, [2005 WI 32](#), ¶ 35, 279 Wis. 2d 169, 694 N.W.2d 344. The statutory scheme that results in the application of [Wis. Stat.](#) § 48.415(4) in a TPR case provides the foundation for a finding of unfitness. *Id.* ¶ 26. At each step in the statutory scheme, findings must be made that reflect on parental unfitness. *Id.* Therefore, there is no requirement of a separate finding of unfitness if the court grants summary judgment under [Wis. Stat.](#) § 48.415(4). Summary judgment can only be used if

the parent “chose not to contest any of these predicate steps.” See *Kenosha Cnty. Dep’t of Hum. Servs. v. Jodie W. (In re Termination of Parental Rts. to Max G.W.)*, [2006 WI 93](#), ¶ 10 n.11, 293 Wis. 2d 530, 716 N.W.2d 845. In *Jodie W.*, the parent “asserted that the conditions of return in her original CHIPS order were impossible for her to meet, effectively contesting the circuit court’s determination that grounds for parental unfitness had been proven.” *Id.*

The court can dismiss the petition if it finds that the evidence does not sustain any one of the findings regarding the grounds for termination. *B.L.J. v. Polk Cnty. Dep’t of Health & Soc. Servs. (In the Int. of K.D.J.)*, [163 Wis. 2d 90, 103, 470 N.W.2d 914 \(1991\)](#), modified in part on other grounds by *Julie A.B.*, [2002 WI 95](#), ¶¶ 4, 5, 27, 255 Wis. 2d 170. Defense counsel should prepare to argue for dismissal based on the petitioner’s failure to prove the elements of the grounds alleged for termination, as defined by statute and applicable case law. See *supra* §§ [17.15–27](#).

The incarceration of a parent does not in itself demonstrate unfitness. The court must consider other factors, such as the parental relationship with the child before and during incarceration, the nature of the crime, the length and type of sentence, the parent’s cooperation with the responsible social services agency and the Department of Corrections, and the best interests of the child. *Jodie W.*, [2006 WI 93](#), ¶¶ 47–50, 293 Wis. 2d 530. In *Jodie W.*, the supreme court held as follows:

We therefore conclude that in cases where a parent is incarcerated and the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent’s incarceration, [\[Wis. Stat. § 48.415\(2\)\]](#) requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child. A contrary interpretation would render the statute unconstitutional.

*Id.* ¶ 51.

## G. Disposition [§ 17.53]

### 1. In General

#### [§ 17.54]

If a jury acts as the trier of fact, the jury can determine only whether the allegations in the petition have been proved by clear and convincing evidence (and, in the case of an Indian child, whether the petitioner has satisfied the requisite burdens of proof in proving the allegations specified in [Wis. Stat. § 48.42\(1\)\(e\)](#), see *infra* § [17.67](#)). The court determines what disposition serves the best interests of the child. [Wis. Stat. § 48.424\(3\)](#); see also *supra* [ch. 10](#) (findings of fact and conclusions of law in fact-finding hearings).

The court should have received a court report for its consideration at disposition. See *supra* § [17.40](#). If not, the court can adjourn disposition for no longer than 45 days and order an agency under [Wis. Stat. § 48.069\(1\)](#) or (2) to file the report for consideration before disposition (or, in the case of an Indian child, the court may order the agency or request the tribal child welfare department of the Indian child’s tribe to file such a report). [Wis. Stat. § 48.424\(4\)\(b\)](#).

The court can terminate parental rights only after finding that all relevant alternatives have been explored and that termination serves the best interest of the child. *A.B. v. P.B. (In the Int. of A.B.)*, [151 Wis. 2d 312, 322, 444 N.W.2d 415 \(Ct. App. 1989\)](#). But see *Jackson Cnty. Dep’t of Health & Hum. Servs. v. K.M.G. (In re Termination of Parental Rts. to V.J.T.)*, No. 2021AP2159, 2022 WL 802895, ¶ 36 (Wis. Ct. App. Mar. 17, 2022) (unpublished opinion citable for persuasive value per [Wis. Stat. § 809.23\(3\)\(b\)](#)) (stating that court need not consider specific alternative to termination).

### 2. Standards and Factors Considered

#### [§ 17.55]

In the determination of the appropriate disposition, the “best interests of the child” standard operates as the “prevailing factor.” [Wis. Stat. § 48.426\(2\)](#); *Sheboygan Cnty. Dep’t of Health & Hum. Servs. v. Julie A.B. (In re Termination of Parental Rts. to Prestin T.B.)*, [2002 WI 95](#), 255 Wis. 2d 170, 648 N.W.2d 402. In deciding what disposition serves the child’s best interests, the court must consider each of the following factors, as applicable:

1. The likelihood of the child’s adoption after termination, [Wis. Stat. § 48.426\(3\)\(a\)](#);
2. The child’s age and health, both at the time of the disposition and, if applicable, at the time of the child’s removal from the child’s home, [Wis. Stat. § 48.426\(3\)\(b\)](#);

3. Whether the child has substantial relationships with the parent or other family members and whether severing these relationships would prove harmful to the child, [Wis. Stat.](#) § 48.426(3)(c);
4. The child's wishes, [Wis. Stat.](#) § 48.426(3)(d);
5. The length of the parent's separation from the child, [Wis. Stat.](#) § 48.426(3)(e); and
6. Whether a termination would enable the child to enter into a more stable and permanent family relationship, considering the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements, [Wis. Stat.](#) § 48.426(3)(f).

See *State v. Margaret H. (In re Termination of Parental Rts. to Darryl T.-H.)*, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475.

When determining the best interests of the child, “the court ‘should welcome’ any evidence relevant to the issue of disposition, including any ‘factors favorable to the parent,’ and must at a minimum consider the six statutory ‘best interests’ factors.” *Steven V. v. Kelly H. (In re Termination of Parental Rts. to Alexander V.)*, 2004 WI 47, ¶ 27, 271 Wis. 2d 1, 678 N.W.2d 856.

### 3. Procedures at Hearings [§ 17.56]

The rules of evidence do not apply at dispositional hearings. [Wis. Stat.](#) § 48.299(4)(b). Any party can present evidence (including expert testimony) relevant to the issue of disposition and can make alternative dispositional recommendations to the court. [Wis. Stat.](#) § 48.427(1). The court must “apply the basic principles of relevancy, materiality and probative value” in deciding whether to admit evidence on questions of fact. [Wis. Stat.](#) § 48.299(4)(b). The court must exclude any immaterial, irrelevant evidence, [Wis. Stat.](#) § 904.02; evidence with more prejudicial effect than probative value, [Wis. Stat.](#) § 904.03; repetitious evidence, *id.*; and evidence otherwise inadmissible under [Wis. Stat.](#) § 901.05, [Wis. Stat.](#) § 48.299(4)(b). The court must exclude hearsay evidence that lacks “demonstrable circumstantial guarantees of trustworthiness.” [Wis. Stat.](#) § 48.299(4)(b).

The Children's Code does not specify the prosecutor's burden of proof at disposition in a TPR case. In CHIPS cases, however, the court of appeals has held that the greater weight of the credible evidence must support the disposition. *S.D.S. v. Rock Cnty. Dep't of Soc. Servs. (In the Int. of T.M.S.)*, 152 Wis. 2d 345, 357, 448 N.W.2d 282 (Ct. App. 1989). This lower burden of proof can apply even at criminal sentencing hearings in federal court. In *United States v. Lee*, 818 F.2d 1052 (2d Cir. 1987), the court of appeals adopted preponderance of the evidence as the standard for fact-finding at federal sentencing. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the U.S. Supreme Court held that using preponderance of the evidence as the standard for weapons enhancement at a state sentencing did not violate due process.

At the dispositional hearing, the foster parent or other physical custodian has a right to be heard either by written or oral statement to the court. [Wis. Stat.](#) § 48.427(1m).

After hearing evidence relevant to disposition, the court must make its decision within 10 days. [Wis. Stat.](#) § 48.427(1).

### 4. Decision by the Court [§ 17.57]

#### a. Dismissing the Petition [§ 17.58]

The court can dismiss the petition if it finds that the evidence does not warrant termination of parental rights, [Wis. Stat.](#) § 48.427(2), even if the court has previously made a finding of parental unfitness. *B.L.J. v. Polk Cnty. Dep't of Health & Soc. Servs. (In the Int. of K.D.J.)*, 163 Wis. 2d 90, 103, 470 N.W.2d 914 (1991), modified in part on other grounds by *Sheboygan Cnty. Dep't of Health & Hum. Servs. v. Julie A.B. (In re Termination of Parental Rts. to Prestin T.B.)*, 2002 WI 95, 255 Wis. 2d 170, 648 N.W.2d 402.

If the court does not terminate parental rights, the court can make and enforce the same types of orders for the suitable care, custody, and support of the child as can a court having jurisdiction over actions affecting the family under [Wis. Stat.](#) ch. 767. [Wis. Stat.](#) § 48.422(6)(c). If the court has found the child to be in need of protection or services, see [Wis. Stat.](#) § 48.415(2); see also *supra* § 17.18, the court can order any of the dispositions under [Wis. Stat.](#) § 48.345, [Wis. Stat.](#) § 48.422(6)(c).

#### b. Termination of Parental Rights [§ 17.59]

The court can enter an order terminating the parental rights of one or both parents. [Wis. Stat.](#) § 48.427(3). If the court orders termination of the parental rights of both parents or the only living parent, the court must take one of the following actions:

1. Transfer guardianship of the child, pending adoptive placement, to
  - a. A county department authorized to accept guardianship under [Wis. Stat.](#) § 48.37(1)(e) (i.e., in Milwaukee County), [Wis. Stat.](#) § 48.427(3m)(a)1.;
  - b. A child welfare agency licensed under [Wis. Stat.](#) § 48.61(5) to accept guardianship, [Wis. Stat.](#) § 48.427(3m)(a)3.;
  - c. The state DCF, [Wis. Stat.](#) § 48.427(3m)(a)4.;
  - d. A relative with whom the child resides, if the relative has filed a petition to adopt the child, is a kinship care relative, or is receiving payments under [Wis. Stat.](#) § 48.62(4) (foster care) for providing care and maintenance for the child, [Wis. Stat.](#) § 48.427(3m)(a)5.; or
  - e. An individual appointed the child's guardian by a court of a foreign jurisdiction, [Wis. Stat.](#) § 48.427(3m)(a)6.;
2. Transfer guardianship of the child to one of the agencies listed above and transfer custody of the child to
  - a. An individual in whose home the child has resided for at least 12 consecutive months immediately before the termination of parental rights, or
  - b. A relative, [Wis. Stat.](#) § 48.427(3m)(b);
3. Transfer guardianship to a county department authorized to accept guardianship under [Wis. Stat.](#) § 48.57(1)(hm) (i.e., in counties other than Milwaukee County) for placement of the child for adoption by the child's foster parents, if the county agrees to accept guardianship and the foster parents agree to adopt the child, [Wis. Stat.](#) § 48.427(3m)(am); or
4. Appoint a guardian under [Wis. Stat.](#) § 48.977 and transfer guardianship and custody of the child to the guardian, [Wis. Stat.](#) § 48.427(3m)(c).

The court must inform each birth parent whose rights have been terminated of the provisions of [Wis. Stat.](#) §§ 48.432, 48.433, and 48.434, which primarily govern access to medical information, identifying information about parents whose rights have been terminated, and release of information to and from birth and adoptive parents. [Wis. Stat.](#) § 48.427(6)(a). The court must also forward to the state DCF the child's name and date of birth, [Wis. Stat.](#) § 48.427(6)(b)1.; the names and current addresses of the child's birth parents, guardian, and legal custodian, [Wis. Stat.](#) § 48.427(6)(b)2.; medical and genetic information, [Wis. Stat.](#) § 48.427(6)(b)3.; and, if the court knows or has reason to know that the child is an Indian child, information relating to the child's membership, or eligibility for membership, in an Indian tribe, [Wis. Stat.](#) § 48.427(6)(b)4.

## 5. Dispositional Orders [§ 17.60]

The court must enter a judgment and order setting forth its findings and disposition. The court must base the disposition on the standards and factors of [Wis. Stat.](#) § 48.426. [Wis. Stat.](#) § 48.43(1); *see also supra* § 17.55. If the court dismisses a petition under [Wis. Stat.](#) § 48.427(2), the order must contain reasons for dismissal. [Wis. Stat.](#) § 48.43(1).

The court must enter a disposition specified under [Wis. Stat.](#) § 48.427(2)–(3p) within 10 days after receiving any evidence related to the disposition. [Wis. Stat.](#) § 48.427(1). A court's oral ruling within 10 days after the dispositional hearing meets this requirement. The written order need not be within 10 days if the oral ruling makes all necessary findings within the 10-day limit. *Dane Cnty. Dep't of Hum. Servs. v. Dyanne M. (In re Termination of Parental Rts. to Artavia B.)*, 2007 WI App 129, ¶¶ 5–16, 301 Wis. 2d 731, [731 N.W.2d 360](#).

**Note.** The *Dyanne M.* case was decided on the issue of the court's loss of competency to proceed for failure to meet a statutory time limit and was decided before the amendment of [Wis. Stat.](#) § 48.315 by 2007 Wis. Act 199. As a result of that amendment, the failure to act within any time period specified in [Wis. Stat.](#) ch. 48 does not deprive the court of jurisdiction or the competency to exercise jurisdiction. Dismissal without prejudice remains a statutory remedy under [Wis. Stat.](#) § 48.315(3) for failure to act within specified time periods.

If the court orders termination of parental rights, the order must contain all of the following:

1. The identity of any agency or individual that has received or will receive guardianship or custody of the child upon termination, [Wis. Stat. § 48.43\(1\)\(a\)](#);
2. The identity of the agency responsible for securing the adoption of the child or for establishing the child in a permanent family setting, *id.*;
3. If the DCF or a county department receives guardianship or custody of the child under [Wis. Stat. § 48.43\(1\)\(a\)](#), an order ordering the child into the placement and care responsibility of the DCF or the county department as required under 42 [U.S.C. § 672\(a\)\(2\)](#) and assigning the DCF or county department primary responsibility for providing services to the child, [Wis. Stat. § 48.43\(1\)\(am\)](#);
4. The agencies and individuals responsible for providing continued care and treatment for any child needing such services, [Wis. Stat. § 48.43\(1\)\(b\)](#);
5. A permanency plan, [Wis. Stat. § 48.43\(1\)\(c\)](#);

**Note.** If a permanency plan has not been prepared at the time of the entry of the order, or if the court enters an order inconsistent with the permanency plan, the agency must file, within 60 days from the date of the order, a permanency plan consistent with the court's order. *Id.*

6. "If a permanency plan has previously been prepared for the child, a finding as to whether the agency primarily responsible for providing services to the child has made reasonable efforts to achieve the permanency goal of the child's permanency plan, including, if appropriate, through an out-of-state placement," [Wis. Stat. § 48.43\(1\)\(cm\)](#); and

**Note.** The court must make the findings under [Wis. Stat. § 48.43\(1\)\(cm\)](#) on a case-by-case basis, based on circumstances specific to the child, and must document or refer to the specific information on which those findings are based in the order. An order that merely refers to the statute without that specific information in the order, or an amended order that retroactively corrects an earlier order that does not comply with the statute, is not sufficient. *Id.*

7. A finding that the termination of parental rights is in the child's best interest, [Wis. Stat. § 48.43\(1\)\(d\)](#).

Judgments terminating parental rights are final orders. [Wis. Stat. § 48.43\(6\)](#). If the parent wishes to appeal, defense counsel must file, within 30 days after entry of the order, a notice of intent to pursue postdisposition relief. [Wis. Stat. § 808.04\(7m\)](#); *see also supra ch. 13* (discussion of initiating appeals of final orders). In addition, the parent wishing to appeal must sign the notice of intent. [Wis. Stat. § 809.107\(2\)\(bm\)](#)6. specifically states that, although the parent's counsel (if any) must also sign, counsel cannot sign the notice of intent in lieu of the parent. *See also* [Wis. Stat. § 809.107\(5\)\(a\), \(6\)\(f\)](#) (providing similar signature requirements for notice of appeal and for petition for review).

The court must provide written notification of the time periods for appeal of the judgment to any person who appears in court and whose parental rights have been terminated. This written notification must be signed and filed with the court. [Wis. Stat. § 48.43\(6m\)](#).

[Wis. Stat. § 48.43\(6\)\(b\)](#) limits a mother's ability to collaterally attack a TPR judgment involving a nonmarital child if the mother filed an affidavit in support of the TPR petition under [Wis. Stat. § 48.42\(1g\)](#). *See supra* § [17.30](#).

**Note.** For change-of-placement procedures for children under the guardianship of an agency, post-TPR, *see* [Wis. Stat. § 48.437](#).

## V. Role of Defense Counsel [§ 17.61]

Because the petitioner has the burden of proving grounds for termination, the parent may simply sit back and make the petitioner prove its case. A "zealous" defense attorney, however, should do more. In representing a parent against whom a TPR petition has been filed, counsel should be careful to investigate whether the technical requirements for TPR have been met—whether a TPR warning has been given, and, if so, when and how. Defense counsel should find the weak points in the petitioner's case and prepare a defense by knowing the grounds for termination and the case law construing those grounds. For example, if the petition alleges that the child has a continuing need for protection or services, defense counsel should study the dispositional orders to discover the reasons the court removed the child from the home and the conditions set for the child's return. Defense counsel should obtain and study the entire, unedited social services file, any operating procedures of the county department of social services, and other relevant records, such as school records and medical records. *See supra ch. 15* (discussion of confidential records in juvenile cases). This information will help defense counsel develop a defense that the



agency responsible for the care of the child and the family did not make diligent efforts in providing services to the family. *See supra* § [17.18](#).

Many grounds for termination of parental rights focus on proof of past events and prediction of future conditions. *See generally* Hertz et al., *supra* § [17.10](#). The proof of past events, for the most part, comes from those records listed above.

Prediction of what will happen in the future usually enters the TPR record through the testimony of experts who offer opinions based on the records. Those records, then, might provide defense counsel with the means to impeach the expert.

Experts might testify at the dispositional hearing as well. Therefore, defense counsel should obtain and study all pertinent records to discover not only evidence to rebut the petitioner’s allegations, but impeachment evidence as well.

Wisconsin requires that experts be qualified before giving expert opinions. [Wis. Stat.](#) § 907.02. See also *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and its progeny. Whenever there is a question of a proposed expert’s qualifications, defense counsel should request a hearing under [Wis. Stat.](#) § 907.02 and require the court to find whether the proposed expert is qualified to make predictions or give opinions in the case.

Motions in limine can be brought whenever a party seeks a pretrial ruling by the trial court on a matter at issue, usually whether to admit or exclude evidence. One common motion in limine seeks the exclusion (or admission) of “other wrongs” (*Whitty*) evidence. *See Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). In particular, the court excludes evidence of other crimes, wrongs, or acts because juries tend to reach a particular verdict based on a party’s “bad character” and not because the prosecution has sustained its burden of proof. *Id.* at 292.

[Wis. Stat.](#) § 904.04(2)(a) provides a list of exceptions to the general rule of exclusion. Although the statutory list is not exhaustive, defense counsel should know the precise definition for each exception and prepare to argue that the evidence that the petitioner seeks to admit does not have any relevance to the case. *See, e.g., State v. Evers*, 139 Wis. 2d 424, 440–41, 407 N.W.2d 256 (1987) (knowledge); *State v. Fishnick*, 127 Wis. 2d 247, 263, 378 N.W.2d 272 (1985) (identity); *State v. Cartagena*, 99 Wis. 2d 657, 667–71, 299 N.W.2d 872 (1981) (motive and intent); *State v. Spraggin*, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977) (plan); *State v. Johnson*, 74 Wis. 2d 26, 42, 245 N.W.2d 687 (1976) (absence of mistake or accident). Even if the evidence fits one of the exceptions listed in the statute, the evidence must still have relevance to an issue in the case, and its probative value must outweigh the prejudice attached to most *Whitty* evidence. *State v. Alsteen*, 108 Wis. 2d 723, 729, 324 N.W.2d 426 (1982). For a useful resource on “other wrongs” evidence, see Edward J. Imwinkelried, *Uncharged Misconduct Evidence* (rev. ed. 1998).

In TPR cases, the petitioner might seek to admit *Whitty* evidence too remote in time, *see Sanford v. State*, 76 Wis. 2d 72, 81, 250 N.W.2d 348 (1977), or to demonstrate the “bad moral character” of the parent.

One type of *Whitty* evidence that the petitioner commonly seeks to admit is evidence of a parent’s criminal record. Defense counsel should keep in mind that this evidence is not automatically admissible. Its admissibility remains subject to [Wis. Stat.](#) § 906.09, which prohibits questioning regarding an individual’s criminal record unless the court has first determined, outside the jury’s presence, whether to admit the evidence. *See Wis. Stat.* §§ 901.03(3), 901.04(1), 906.09(3). The court must determine which convictions, if any, to exclude because their unfair prejudice substantially outweighs their probative value. [Wis. Stat.](#) § 906.09(2). Even if the court allows evidence of the parent’s conviction of a crime for purposes of attacking the parent’s character for truthfulness, the examiner can ask only whether the parent has been convicted of a crime (or adjudicated delinquent) and, if so, how many times. *Id.*; *see also Voith v. Buser*, 83 Wis. 2d 540, 546, 266 N.W.2d 304 (1978) (stating that examiner cannot ask or offer any proof of nature of conviction). Under the theory of relevance, however, the court may admit evidence of the substance of a parent’s convictions in a TPR proceeding—for example, to establish the quality of the relationship between the parent and child. *State v. Quinsanna D. (In re Termination of Parental Rts. to Teyon D.)*, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752 (affirming circuit court’s admission of mother’s drug-related and other convictions to prove that she had failed to assume parental responsibility).

One set of commentators has suggested that TPR cases sometimes serve as a “forum for comment on sexual morality” and “to punish women who stray from the straight and narrow path of sexual fidelity or who engage in nonmarital sexual activity.” Lucy Cooper & Patricia Nelson, *Adoption and Termination Proceedings in Wisconsin: A Reply Proposing Limiting Judicial Discretion*, 66 Marq. L. Rev. 641, 644–45 (1983). Unless the petitioner has demonstrated the relevance of the evidence to whatever grounds allegedly support the court’s jurisdiction, the evidence is inadmissible. *See Wendland v. Wendland*, 29 Wis. 2d 145, 154, 138 N.W.2d 185 (1965). The evidence must have relevance to a fact at issue at trial.



Before the court can admit relevant *Whitty* evidence, the court must determine that the jury could reasonably find the evidence to be true. *State v. Schindler*, 146 Wis. 2d 47, 54, 429 N.W.2d 110 (Ct. App. 1988) (adopting test of *Huddleston v. United States*, 485 U.S. 681 (1988)).

At disposition, the court must determine whether all relevant alternatives to termination have been explored. For example, if the child has been found to be in need of protection or services, the court can decide not to terminate and, instead, can order any of the dispositions available in CHIPS cases. Defense counsel should become familiar with the services and resources available through the county, as well as with any alternatives not explored. Based on the best interest of the child standard and related factors of [Wis. Stat. § 48.426](#), defense counsel might want to hire as an expert social worker who will rebut the testimony of the county's social workers. If alternative programs are available, counsel might hire experts from those programs to testify about their programs as alternatives to termination.

## VI. [Voluntary Termination of Parental Rights](#)

### [§ 17.62]

A parent can voluntarily consent to the termination of parental rights. See [Wis. Stat. § 48.41](#). The court, however, must still determine whether to terminate parental rights. [Wis. Stat. § 48.41\(1\)](#). Venue for voluntary termination of parental rights cases lies where the birth parent or the child lives at the time of the petition is filed. [Wis. Stat. § 48.185\(2\)](#).

[Wis. Stat. § 48.41](#) mandates the procedure for voluntary consent to termination. The parent must appear personally and give the parent's consent to the termination, under [Wis. Stat. § 48.41\(2\)\(a\)](#), unless an exception to that procedure applies under [Wis. Stat. § 48.41\(2\)\(b\)](#), (c), (d), or (e). The judge must explain the effect of termination of parental rights and must determine, through colloquy with the parent or parent's counsel, that the parent knowingly and voluntarily consents. [Wis. Stat. § 48.41\(2\)\(a\)](#). For parents who the court has determined cannot appear, for putative fathers, and for birth parents whose rights are sought to be terminated by a stepparent wishing to adopt the child, the parent may consent to termination of parental rights in writing or by affidavit. [Wis. Stat. § 48.41\(2\)\(b\)1.](#), (c), (d). If the court determines that a parent cannot appear personally, the court instead may admit testimony by telephone or by live audiovisual means, at the parent's request, unless good cause to the contrary is shown. [Wis. Stat. § 48.41\(2\)\(b\)2](#).

**Note.** WICWA requires additional procedures for a voluntary termination of parental rights to an Indian child. [Wis. Stat. § 48.41\(2\)\(e\)](#) (requiring consent under [Wis. Stat. § 48.028\(5\)\(b\)](#)); 2009 Wis. Act 94. [Wis. Stat. § 48.028\(5\)\(b\)](#) requires that the consent [to termination] is executed in writing, recorded before a judge, and accompanied by a written certification by the judge that the terms and consequences of consent were fully explained in detail and were fully understood by the parent. The judge shall also certify that the parent fully understood the explanation in English or that the explanation was interpreted into language the parent understood. Failure to meet these requirements renders the consent invalid.

If the guardian ad litem has reason to doubt the parent's competency to give an informed and voluntary consent, the guardian ad litem must so inform the court. [Wis. Stat. § 48.41\(3\)](#). This standard corresponds to the standard in [Wis. Stat. § 971.14](#), which requires the court to order a competency examination if the court has "reason to doubt" the competency of a defendant in a criminal case. Defense counsel must raise the issue of competency whenever counsel has reason to doubt the client's competency. *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986); see also *State v. Meeks*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. The court must then inquire into the parent's capacity to consent to termination of parental rights. [Wis. Stat. § 48.41\(3\)](#). If the court finds the parent incapable of knowingly and voluntarily consenting to termination of parental rights, the court must dismiss the proceedings without prejudice. *Id.*

If the court finds the consent to termination voluntary, the judge can proceed immediately to disposition after considering the best interests of the child standard and related factors under [Wis. Stat. § 48.426](#). [Wis. Stat. § 48.41\(1\)](#). The parent's consent to termination of parental rights does not suffice as a basis for ordering termination. As the court of appeals has noted, a court cannot terminate parental rights "merely to advance the parents' convenience and interests, either emotional or financial." *A.B. v. P.B. (In the Int. of A.B.)*, 151 Wis. 2d 312, 322, 444 N.W.2d 415 (Ct. App. 1989); see also *Gerald O. v. Cindy R. (In re Termination of Parental Rts. of Michael I.O.)*, 203 Wis. 2d 148, 551 N.W.2d 855 (Ct. App. 1996). A court can order termination only after the court has found that all alternatives have been explored and that termination serves the best interest of the child. *A.B.*, 151 Wis. 2d at 322.

## VII. Termination of Parental Rights Under the Indian Child Welfare Act [§ 17.63]

### A. [In General](#)

#### [§ 17.64]

Wisconsin formally codified the federal ICWA, 25 [U.S.C. §§ 1901–1963](#), with passage of 2009 Wis. Act 94 (Act 94). [Wis. Stat. § 48.028](#) contains the key provisions of what is now called WICWA, but Act 94 affects all sections of the Children's Code and Juvenile Justice Code

when dealing with removal of an Indian child from the home. Before passage of Act 94, the Wisconsin Supreme Court had held that the federal ICWA did not preempt [Wis. Stat.](#) ch. 48. Rather, the supreme court had held that courts should harmonize the provisions of the Children’s Code with those of ICWA and should follow the Children’s Code when it “provides additional safeguards” beyond those of the federal law. *I.P. v. State (In the Int. of D.S.P.)*, 166 Wis. 2d 464, 473, 480 N.W.2d 234 (1992). [Wis. Stat.](#) § 48.028(10) now explicitly provides:

The federal Indian Child Welfare Act ... supersedes [\[Wis. Stat. ch. 48\]](#) in any Indian child custody proceeding governed by that act, except that in any case in which [\[Wis. Stat. ch. 48\]](#) provides a higher standard of protection for the rights of an Indian child’s parent or Indian custodian than the rights provided under that act, the court shall apply the standard under [\[Wis. Stat. ch. 48\]](#).

Sections [17.65–.69](#), *infra*, describe some important highlights of WICWA in TPR cases.

**Caution.** Counsel should familiarize themselves with WICWA and ICWA, related case law, and Bureau of Indian Affairs resources because ICWA contains strict notice requirements and evidentiary requirements that can provide a number of challenges to the TPR.

Further, the federal government has clarified, and strengthened the ICWA regulations. Attorneys can look at the Bureau of Indian Affairs (BIA) website for more information at <https://www.bia.gov/bia/ois/dhs/icwa> (last visited Dec. 6, 2022). In particular, the federal rules that took effect December 12, 2016:

1. Clarify ICWA’s applicability;
2. Require state courts to ask, in every child custody proceeding, whether ICWA applies;
3. Establish limits on the duration of emergency placements before full ICWA rights are afforded to the child, parents or Indian custodians, and tribes;
4. Require notice to the parents and tribe of involuntary proceedings;
5. Clarify the procedures for transfer to a tribal court and establish parameters of what is “good cause” to deny transfer;
6. Clarify who may serve as a qualified expert witness;
7. Clarify when placement preferences apply and what placement preferences apply in foster care, preadoptive, and adoptive placements, and establish parameters of what is “good cause” to depart from the placement preferences;
8. Clarify requirements for voluntary proceedings;
9. Confirm adult adoptees’ rights to information about their tribal affiliation;
10. Identify which records states and the BIA must maintain regarding implementation of ICWA; and
11. Highlight the statutory right to invalidate an action taken in violation of ICWA.

Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (codified at 25 [C.F.R.](#) pt. 23).

## B. Jurisdiction [§ 17.65]

Either parent in a termination proceeding regarding Indian children has the right to request to transfer the case to tribal court, as do the child’s Indian custodian and tribe. [Wis. Stat.](#) § 48.028(3)(c). Upon receiving a petition for transfer, the circuit court must determine whether an exception to tribal court jurisdiction applies. The circuit court need not transfer jurisdiction to the tribal court if (1) a parent of the Indian child objects to the transfer; (2) the child’s tribe does not have a tribal court or the tribal court of the child’s tribe declines jurisdiction; or (3) the court determines that good cause exists for denying the transfer. [Wis. Stat.](#) § 48.028(3)(c); *see also* [Brown Cnty. v. Marcella G. \(In the Int. of Shawnda G.\)](#), 2001 WI App 194, 247 Wis. 2d 158, 634 N.W.2d 140 (applying 25 [U.S.C.](#) § 1911(b)). For relevant considerations for determining good cause, see [Wis. Stat.](#) § 48.028(3)(c)3.a.–c.

## C. Additional Proof and Burden-of-Proof Issues [§ 17.66]

## 1. In General [§ 17.67]

If an Indian child is involved in the proceeding, not only must the petitioner prove the grounds for termination, *see* [Wis. Stat. § 48.415](#), but the court must also find the following:

1. Proof beyond a reasonable doubt, including testimony by a qualified expert witness (as defined in [Wis. Stat. § 48.028\(2\)\(g\)](#), and chosen in the order of preference listed in [Wis. Stat. § 48.028\(4\)\(f\)](#)), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, [Wis. Stat. § 48.028\(4\)\(e\)1.](#); *see infra* [§ 17.69](#), and
2. Proof by clear and convincing evidence that active efforts as described in [Wis. Stat. § 48.028\(4\)\(g\)1.](#), have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful, [Wis. Stat. § 48.028\(4\)\(e\)2.](#); *see infra* [§ 17.68](#).

[Wis. Stat. § 48.415](#). The petitioner must also plead these additional elements—alleging “reliable and credible information” to support them—in the original petition for termination of parental rights. [Wis. Stat. § 48.42\(1\)\(e\)](#).

Therefore, in any TPR involving an Indian child there will be dual burdens of proof. *See* [Wis. Stat. § 48.424\(1\)\(a\), \(b\)](#); *Monroe Cnty. Dep't of Hum. Servs. v. Luis R. (In re Termination of Parental Rts. to Vaughn R.)*, 2009 WI App 109, 320 Wis. 2d 652, 770 N.W.2d 795 (interpreting 25 [U.S.C. § 1912\(d\), \(f\)](#)).

## 2. Active Efforts [§ 17.68]

The petitioner must prove in every TPR case that active efforts have been made. [Wis. Stat. §§ 48.424\(1\)\(b\), 48.42\(1\)\(e\)](#). Active efforts are defined in [Wis. Stat. § 48.028\(4\)\(g\)](#) as efforts showing that:

there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers.

[Wis. Stat. § 48.028\(4\)\(g\)](#) further details the activities that the fact-finder must consider at trial and determine whether were in fact done. Failure to establish, by clear and convincing evidence, that active efforts have been made, and have been unsuccessful, will result in failure of the TPR.

## 3. Qualified Expert Witnesses [§ 17.69]

As indicated in section [17.67](#), *supra*, testimony by a qualified expert witness is required on the issue of serious emotional or physical damage to an Indian child caused by continued custody with the child's parent or Indian custodian. A qualified expert witness is defined in [Wis. Stat. § 48.028\(2\)\(g\)](#). There are four categories of expert witnesses: (1) a member of the Indian child's tribe recognized as knowledgeable regarding tribal customs relating to family organization and child-rearing practices; (2) a member of another tribe with the same recognized expertise; (3) a professional person with substantial education and experience in the person's specialty and having substantial knowledge of the customs, traditions, and values of the Indian child's tribe relating to family organizations and child rearing; and (4) a layperson having substantial knowledge in the delivery of child and family services to Indians and substantial knowledge of the prevailing cultural standards and child-rearing practices of the Indian child's tribe. [Wis. Stat. § 48.028\(2\)\(g\)](#). The court of appeals has held that a qualified expert witness is something more than the average social worker assigned to the child's case. *Monroe Cnty. Dep't of Hum. Servs. v. Luis R. (In re Termination of Parental Rts. to Vaughn R.)*, 2009 WI App 109, ¶¶ 30–40, 320 Wis. 2d 652, 770 N.W.2d 795 (interpreting 25 [U.S.C. § 1912\(f\)](#) in a pre-WICWA case).

Further, [Wis. Stat. § 48.028\(4\)\(f\)](#) establishes a priority for the use of each of the different types of qualified expert witnesses described in [Wis. Stat. § 48.028\(2\)\(g\)](#). [Wis. Stat. § 48.028\(4\)\(f\)1.](#) provides that a qualified expert witness must be chosen in the following order of preference: member of the Indian child's tribe, a member of another tribe, a professional person, and, lastly, a layperson. A party calling the witness can use a lower-preference qualified expert witness only if the party shows that it made a diligent effort to find a higher-preference witness. [Wis. Stat. § 48.028\(4\)\(f\)2.](#)

## VIII. Standard Juvenile Court Forms [§ 17.70]

Following is a list of standard juvenile court forms that may pertain to the material discussed in this chapter. For a more complete list of standard juvenile court forms that could pertain to the material discussed in the book, see [appendix B](#), *infra*.

**Juvenile Court Forms—[Wis. Stat. Chs. 48 and 938](#)  
Wisconsin Records Management Committee**

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose  |
|-------------------------|---------------------------|---|--|
| <a href="#">JC-1630</a> | Ch. 48                    | Petition for termination of parental rights                     | Petition to initiate a proceeding to terminate the parental rights of a parent   |
| <a href="#">JC-1633</a> | Ch. 48                    | Summons (TPR)   | Notice to parents that a petition to terminate parental rights has been filed and that parents must appear in court for a hearing                                    |
| <a href="#">JC-1634</a> | Ch. 48                    | Consent to use mother's name for publication                    | Authorization by mother to use her name in the notice when publication is required for a termination of parental rights petition                                     |
| <a href="#">JC-1635</a> | Ch. 48                    | Notice and order of hearing (for publication) (TPR)             | Notice to parents who cannot otherwise be served that a petition to terminate parental rights has been filed and order to summons the parents to court for a hearing |
| <a href="#">JC-1636</a> | Ch. 48                    | Consent to termination of parental rights (affidavit)           | Affidavit by a parent consenting to the termination of parental rights to a child  |
| <a href="#">JC-1637</a> | Ch. 48                    | Consent to termination of parental rights (judicial)            | Consent form signed by a parent before a judicial officer, consenting to the termination of his or her parental rights to a child                                    |
| <a href="#">JC-1638</a> | Ch. 48                    | Order concerning termination of parental rights (voluntary)     | Order formally indicating the court's decision on a petition to voluntarily terminate the parental rights of a parent  |
| <a href="#">JC-1639</a> | Ch. 48                    | Order terminating parental rights (involuntary)                 | Order formally indicating the court's decision on a petition to terminate the parental rights of a parent  |
| <a href="#">JC-1640</a> | Ch. 48                    | Petition for adoptive placement                                 | Petition to seek the court's approval for the placement of a child in a home for an adoption   |
| <a href="#">JC-1641</a> | Ch. 48                    | Order for hearing and investigation/adoptive placement/adoption | Court order directing a hearing and investigation for an adoptive placement or adoption  |
| <a href="#">JC-1642</a> | Ch. 48                    | Order for adoptive placement                                    | Order placing a child in a proposed adoptive home for preadoption purposes   |
| <a href="#">JC-1643</a> | Ch. 48                    | Order for hearing and screening                                 | Court order directing a single-interview screening for stepparent adoption   |

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose  |
|-------------------------|---------------------------|--|--|
| <a href="#">JC-1645</a> | Ch. 48                    | Petition for minor child adoption  | Petition to the court requesting the court approve an adoption of a minor child                                      |
| <a href="#">JC-1646</a> | Ch. 48                    | Consent to adoption  | Form signed by a child over 14 and an adult consenting to the adoption   |
| <a href="#">JC-1647</a> | Ch. 48                    | Order on petition for minor child adoption   | Court order granting or denying adoption petition  |
| <a href="#">JC-1690</a> | Ch. 48                    | Petition in juvenile court for temporary restraining order and/or petition and motion for injunction hearing (child abuse) | Petition for court order to restrain somebody from committing child abuse and to schedule a hearing on an injunction |
| <a href="#">JC-1691</a> | Ch. 48                    | Temporary restraining order and notice of injunction hearing (child abuse)   | Formal order of the court on the petition for a TRO (child abuse) and notice of hearing on an injunction             |
| <a href="#">JC-1692</a> | Ch. 48                    | Injunction (child abuse)   | Formal document granting injunction (child abuse)  |
| <a href="#">JD-1720</a> | Both                      | Summons  | Court order requiring a person to appear in court and to respond to a citation or petition                           |

## Supplement Chapter 18

### Parental Consent for Minor's Abortion

Book sections supplemented: [18.1](#), [18.2](#), [18.14](#), and [18.19](#)

#### 18.1 Scope of Chapter

[Page 1: Amended currency information in footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272.

[Page 1-2: Amended Caution](#)

**Caution.** Although this chapter does not provide an in-depth discussion about abortion access in Wisconsin, it acknowledges that Wisconsin courts are in the process of determining whether the ban on abortion under [Wis. Stat. § 940.04](#) is enforceable in the wake of *Dobbs v. Jackson Women's Health Organization*, [597 U.S. 215](#) (2022). See Book & Supp. §§ 18.2, 18.14.

#### 18.2 History

[Page 2: Amended first Planned Parenthood citation in first paragraph of section](#)



[Wis. Stat.](#) § 48.375 took effect on July 1, 1992, *see* 1991 Wis. Act 263, and codified U.S. Supreme Court cases that had held constitutional a state requirement of parental consent or notification before a minor can obtain an abortion, if the state provides a judicial bypass mechanism so that mature minors (and minors whose best interests would be served by confidential abortions) can terminate pregnancy without parental consent. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

[Page 2: Replaced second paragraph in section](#)

In June 2022, the U.S. Supreme Court overruled *Roe v. Wade*, [410 U.S. 113](#) (1973), and *Casey*, concluding that a woman’s choice to terminate a pregnancy is not constitutionally protected. *Dobbs v. Jackson Women’s Health Org.*, [597 U.S. 215](#) (2022). As a result of this decision, the ability to obtain abortion care, at any point in a pregnancy, regardless of viability, will vary by state. In Wisconsin, several statutes address civil and criminal liability for abortion care. *See e.g.*, [Wis. Stat.](#) §§ 253.095, 253.10, 253.105, 253.107, 940.04, 940.13, 940.15, 940.16.

Although restrictions (civil and criminal) on abortion access are outside the scope of this chapter, *Dobbs* and these statutes and their interpretation by Wisconsin courts will inform when, or whether, a minor will be able to seek parental consent for an abortion. Litigation on the applicability of [Wis. Stat.](#) § 940.04 to all abortion access in Wisconsin is still ongoing. The Wisconsin Supreme Court scheduled oral argument in *Kaul v. Urmanski*, [No. 2023AP002362](#), for November 11, 2024. *See Supp.* § 18.14.

18.14 Other Abortion-Related Prohibitions

[Pages 7–8: Replaced Note](#)

**Note.** 2015 Wis. Act 56 created criminal penalties and civil damages for persons who violate the prohibition against performing, inducing, or attempting to perform or induce an abortion when the unborn child is considered capable of experiencing pain. *See Wis. Stat.* § 253.107(4), (5). Given that *Dobbs v. Jackson Women’s Health Organization*, [597 U.S. 215](#) (2022), has overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, [505 U.S. 833](#) (1992), and conflicts with some Wisconsin Statutes, *see Book & Supp.* § 18.2, it is unclear when abortion care is permissible in Wisconsin.

As of the publication of this update to the *Wisconsin Juvenile Law Handbook*, parties have briefed a case that could decide this issue in the Wisconsin Supreme Court, which heard oral argument in the case on November 11, 2024. *See Kaul v. Urmanski*, No. 2023AP2362. In the decision appealed from, the Dane County Circuit Court held that [Wis. Stat.](#) § 940.04 “does not apply to abortions.” *Kaul v. Urmanski*, No. 22CV1594 (Wis. Cir. Ct. Dane Cnty. Dec. 5, 2023), <https://clearinghouse.net/doc/144285/>. The Wisconsin Supreme Court granted permission to bypass the Wisconsin Court of Appeals in this case.

18.19 Standard Juvenile Court Forms

[Page 9: Amended Caution](#)

**Caution.** As of the publication of the 2024–25 supplement to the *Wisconsin Juvenile Law Handbook*, the standard court forms listed in Book section 18.19 have not been withdrawn since the decision in *Dobbs v. Jackson Women’s Health Organization*, [597 U.S. 215](#) (2022). As explained in Supplement sections 18.2 and 18.14, the Wisconsin Supreme Court has not yet resolved whether the broad ban on abortion under [Wis. Stat.](#) § 940.04 is enforceable in the wake of *Dobbs*.

[Page 9: Amended Name of Form and Purpose description for Form JC-1621 in table](#)

| Form Number | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|-------------|---------------------------|--|---|
| JC-1621     | Ch. 48                    | Declaration of clergyperson to waive parental consent for abortion | Declaration, which states that certain statutory requirements have been complied with, must accompany a “petition to waive parental consent for abortion” when it is filed by a clergy member |



# Chapter 18

## Parental Consent for Minor's Abortion

**Note.** This chapter was originally written by Evelyn J. Mazack of the Office of the Public Defender.

### I. [Scope of Chapter](#)

#### [§ 18.1]

Under [Wis. Stat.](#) § 48.375, an unemancipated minor who seeks an abortion must have the consent of at least one parent or an adult relative, unless a court grants the minor a waiver from the consent requirement. This chapter discusses the consent requirement and the judicial waiver process.

**Caution.** Although this chapter does not provide an in-depth discussion of the ability to obtain abortion care in Wisconsin, it acknowledges that Wisconsin courts have not yet resolved whether the broad ban on abortion under [Wis. Stat.](#) § 940.04 is enforceable in the wake of [Dobbs v. Jackson Women's Health Organization](#), 142 S. Ct. 2228 (2022). See *infra* §§ [18.2](#), [18.14](#).

**Note.** [Wis. Stat.](#) § 48.375(2)(e) defines an *emancipated minor* as the following:

[A] minor who is or has been married; a minor who has previously given birth; or a minor who has been freed from the care, custody and control of her parents, with little likelihood of returning to the care, custody and control prior to marriage or prior to reaching the age of majority.

Although part of the Wisconsin Children's Code, the parental consent statute uniformly refers to "minor" rather than "child."

### II. [History](#)

#### [§ 18.2]

[Wis. Stat.](#) § 48.375 took effect on July 1, 1992, , see 1991 Wis. Act 263, and codified U.S. Supreme Court cases that had held constitutional a state requirement of parental consent or notification before a minor can obtain an abortion, if the state provides a judicial bypass mechanism so that mature minors (and minors whose best interests would be served by confidential abortions) can terminate pregnancy without parental consent. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

In June 2022, the U.S. Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey*, concluding that a woman's choice to terminate a pregnancy is not constitutionally protected. [Dobbs v. Jackson Women's Health Org.](#), 142 S. Ct. 2228 (2022). This means the ability to obtain abortion care—even early in the pregnancy—will vary by state. In Wisconsin, several statutes address civil and criminal liability for abortion care. See, e.g., [Wis. Stat.](#) §§ 253.095, 253.10, 253.105, 253.107, 940.04, 940.13, 940.15, 940.16. Although restrictions (civil and criminal) on abortion care are outside the scope of this chapter, *Dobbs* and these statutes will inform when, or if, a minor will be able to seek parental consent for an abortion.

### III. Circuit Court Procedure [§ 18.3]

#### A. Consent [§ 18.4]

Unless granted a judicial waiver, a minor must obtain written consent from a parent, guardian, legal custodian, foster parent, or adult family member before a physician can terminate the minor's pregnancy. [Wis. Stat.](#) §§ 48.375(4)(a)1., 253.10; see also [Wis. Stat.](#) § 48.375(2) (b) (defining *adult family member* as a person at least 25 years of age who is a grandparent, aunt, uncle, brother, or sister of the minor). A foster parent can give consent only if a formal foster placement has occurred and if the minor's parent has signed a waiver granting the foster parent authority to consent to medical services or treatment for the minor. [Wis. Stat.](#) § 48.375(4)(a)1.

**Note.** A parent with legal custody of a child may delegate, by a power of attorney, any of his or her powers regarding the care and custody of the child, *except* for specified powers such as the power to consent to the performance or inducement of an abortion on or for the child. [Wis. Stat.](#) § 48.979(1)(a).

[Wis. Stat.](#) § 253.10(3)(b) provides that a woman (including a minor) must consent to an abortion freely and voluntarily without coercion by any person:

The physician who is to perform or induce the abortion shall determine whether the woman's [or minor's] consent is, in fact, voluntary. [T]he physician shall make the determination by speaking with the woman [or minor] in person, out of the presence of anyone other than a person working for or with the physician. If the physician has reason to suspect that the woman [or minor] is in danger of being physically harmed by anyone who is coercing the woman [or minor] to consent to an abortion against her will, the physician shall inform the woman [or minor] of services for victims or individuals at risk of domestic abuse and provide her with private access to a telephone.

[Wis. Stat.](#) § 253.10(3)(c)1.jm. makes it unlawful for a physician to perform or induce an abortion without a woman's (or minor's) voluntary consent.

In order to meet the statutory requirement of informed consent, the woman (or minor) must obtain an ultrasound before obtaining an abortion. [Wis. Stat.](#) § 253.10(3)(c)1.gm.

[Wis. Stat.](#) § 253.10(3g) specifies the requirements of the ultrasound, which include the following:

1. An obstetric ultrasound on the pregnant woman using whichever transducer the woman chooses after the options have been explained to her;

**Note.** A facility that offers ultrasounds at no cost to satisfy the requirements of [Wis. Stat.](#) § 253.10(3g) must have available transducers to perform both transabdominal and transvaginal ultrasounds.

2. A simultaneous oral explanation to the pregnant woman during the ultrasound of what the ultrasound is depicting, including the presence and location of the unborn child within the uterus, the number of unborn children, and the occurrence of the death of an unborn child, if such a death has occurred;
3. Display of the ultrasound images so that the pregnant woman may view them;
4. A medical description of the ultrasound images, including the dimensions of the unborn child and a description of any external features and internal organs that are present and viewable on the image; and
5. A means for the pregnant woman to visualize any fetal heartbeat, if a heartbeat is detectable.

[Wis. Stat.](#) § 253.10(3g).

**Note.** In situations in which the minor does not seek judicial waiver, consent to abortion must be “voluntary and informed.” [Wis. Stat.](#) §§ 48.375(4)(a)1., 253.10. Discussion of the “voluntary and informed” requirement, as added to the statutes by 1995 Wis. Act 309, is beyond the scope of this chapter.

An emancipated minor does not need written consent. [Wis. Stat.](#) § 48.375(4)(a). Additionally, a minor does not need written consent or a judicial waiver under any of the following circumstances:

1. A medical emergency exists that complicates the pregnancy and requires an immediate abortion. [Wis. Stat.](#) § 48.375(4)(b)1.
2. The pregnancy resulted from a sexual assault, and the minor did not indicate a freely given agreement to have sexual intercourse. [Wis. Stat.](#) § 48.375(4)(b)1g. The medical personnel must report the sexual assault to the authorities for possible prosecution of the offender. *Id.*; [Wis. Stat.](#) § 48.981(2), (2m)(e).
3. A psychiatrist or psychologist states in writing that the minor will likely commit suicide rather than either file a petition for judicial waiver or approach her parents or others who could give consent. [Wis. Stat.](#) § 48.375(4)(b)1m.

4. The pregnancy resulted from incest or sexual intercourse with a relative of the minor, the minor's guardian, the minor's legal custodian, or a person who resides or has resided regularly or intermittently in the same dwelling as the minor. [Wis. Stat. §§ 48.375\(4\)\(b\)2., 48.981\(1\)\(am\)1., 2., 3., 4., 8.](#) The medical personnel must report the sexual intercourse to the authorities as required under [Wis. Stat. § 48.981\(2m\)\(d\)1.](#) [Wis. Stat. § 48.375\(4\)\(b\)2.](#)
5. The minor has been abused, *see* [Wis. Stat. § 48.02\(1\)](#) (defining *abuse*), by one of the persons required to give written consent. [Wis. Stat. § 48.375\(4\)\(b\)3.](#) The minor must file a written statement that such abuse has occurred. The medical personnel must report the abuse to the authorities for possible prosecution of the offender. *Id.*; [Wis. Stat. § 48.981\(2\)](#); *see also* [Wis. Stat. § 48.981\(3\)](#) (describing authorities to which report must be made).

## B. Judicial Waiver of Consent Requirement [§ 18.5]

### 1. Filing Petition [§ 18.6]

A petition for waiver of parental consent is confidential, [Wis. Stat. § 48.375\(7\)\(e\)](#), and is brought under the name "Jane Doe." [Wis. Stat. § 48.257\(1\)](#). The minor or a member of the clergy on behalf of the minor files the petition with the clerk of court. [Wis. Stat. § 48.257\(5\)](#) identifies the minor or an intake worker as the persons authorized to file the petition, but [Wis. Stat. § 48.375\(6\)](#) also states that a clergy member can file on behalf of a minor. *See also* [Wis. Stat. § 48.257\(1\)\(h\), \(4\)](#). If a clergy member files the petition, the minor need not attend the waiver proceedings unless the judge requires her presence. *See* [Wis. Stat. § 48.375\(7\)\(bm\)](#).

**Note.** The Wisconsin Statutes define *member of the clergy* as a "spiritual adviser of any religion, whether the adviser is termed priest, rabbi, minister of the gospel, pastor, reverend or any other official designation." [Wis. Stat. § 765.002\(1\)](#).

The clergy member must also file with the petition an affidavit specifying that the clergy member has done the following:

1. Met personally with the minor;
2. Explored with the minor the alternatives available to her for managing the pregnancy, including (a) carrying the pregnancy to term and keeping the infant, (b) carrying the pregnancy to term and placing the infant with a relative or with another family member for adoption, or (c) having an abortion; and
3. Discussed with the minor the possibility of involving her parents, her guardian or legal custodian, her foster parents, or an adult member of her family in the decision making concerning the pregnancy.

[Wis. Stat. § 48.375\(7\)\(bm\)](#).

The petition must contain facts sufficient to establish that the minor is mature and well-informed enough to make her own abortion decision, as well as facts showing that an abortion will serve the minor's best interest. [Wis. Stat. § 48.257\(1\)\(e\), \(f\)](#). Facts demonstrating maturity and access to information include whether the minor has a job; does well in school; has read books or articles about reproductive health, parenting, adoption, termination of parental rights, or abortion; or has discussed issues about reproductive health with doctors or counselors. Facts showing that an abortion would serve the minor's best interest can include information about the emotional, physical, and mental impact the birth or adoption would have on the minor. The court looks at the "best interest" standard only if the court finds the minor not mature and well-informed enough to make the abortion decision on her own. *See* [Wis. Stat. § 48.257\(1\)\(f\)](#). In addition, the petition must contain the other information specified in [Wis. Stat. § 48.257](#).

Under [Wis. Stat. § 48.29\(3\)](#), the minor can select any judge in any county to hear the petition.

### 2. Right to Counsel [§ 18.7]

Under [Wis. Stat. §§ 48.375\(7\)\(a\)1. and 48.23\(1m\) \(cm\)](#), counsel must represent a minor in all waiver proceedings, regardless of whether the minor resides in the state. *See* [Wis. Stat. § 48.375\(3\)](#). Counsel serves as an advocate for the minor. [Wis. Stat. § 48.23\(1g\)](#). It remains unclear, however, whether the minor can waive her right to counsel in these proceedings. Both the Children's Code and the Juvenile Justice Code generally allow minors 15 years of age or older to waive counsel if the court determines that the minor makes the waiver knowingly and voluntarily. *See* [Wis. Stat. §§ 48.23\(1m\)\(a\), \(b\)1., 938.23\(1m\)\(a\), \(b\)1.](#)

Trial counsel also represents the minor on all appeals arising out of the proceedings, unless the minor requests substitution of counsel or unless extenuating circumstances make it impossible for counsel to continue representing the minor. [Wis. Stat. § 48.23\(4\)](#).

### 3. Initial Appearance [§ 18.8]

[Wis. Stat. § 48.375\(7\)\(a\)](#) and (am) govern the initial appearance. The appearance must take place in the judge's chambers on the day of the filing of the petition or on the next calendar day. At the initial appearance, the court must do the following: appoint counsel if the minor does not already have representation; set a time for a hearing on the petition; and notify parties of the time, date, and place of the hearing. [Wis. Stat. § 48.375\(7\)\(a\)](#). The court can appoint a guardian ad litem, at its discretion. [Wis. Stat. § 48.375\(7\)\(am\)](#). The court can conduct the initial appearance by telephone or live audiovisual means. [Wis. Stat. § 807.13](#); *see also* [Wis. Stat. § 885.56](#).

The statutes list certain persons as prohibited from attending the initial appearance, including the minor's parents, guardian, legal custodian, foster parents, and adult family members. [Wis. Stat. § 48.375\(7\)\(f\)](#). The statute does not specify whether the alleged father of the unborn child can attend the proceeding; [Wis. Stat. § 48.375\(7\)\(f\)](#) does not explicitly exclude him from the proceedings. Because, however, of the confidentiality of the proceedings, *see* [Wis. Stat. § 48.375\(7\)\(e\)](#), the alleged father presumably will not know of them.

### 4. Hearing on Petition [§ 18.9]

The court must hold the hearing on the petition in chambers unless the minor, through her counsel, demands a public fact-finding hearing. [Wis. Stat. § 48.375\(7\)\(b\)](#). The court must schedule the hearing in time to allow the court to issue a determination and order within three calendar days after the initial appearance, unless the minor and her counsel consent to an extension. [Wis. Stat. § 48.375\(7\)\(d\)](#). Alternatively, if a member of the clergy filed the petition, he or she can consent to an extension. At the hearing, the court must consider the report of the guardian ad litem (if any) and hear evidence relating to:

1. The emotional development, maturity, intellect, and understanding of the minor;
2. The minor's understanding about the nature of, possible consequences of, and alternatives to the intended abortion procedure; and
3. Anything else the court might find useful in making its determination.

[Wis. Stat. § 48.375\(7\)\(b\)1.–3.](#)

If the minor chooses to reveal the confidential waiver proceeding to potential witnesses, possible sources of evidence include counselors, teachers, adult friends, and the doctor referring the minor for abortion or advising her on the nature and consequences of alternatives to abortion.

Persons barred from attending the initial appearance are also barred from the hearing on the petition. [Wis. Stat. § 48.375\(7\)\(f\)](#); *see also* *supra* § [18.8](#).

### 5. Determination [§ 18.10]

The court must grant the petition if it finds either that the minor is mature and well-informed enough to make the abortion decision on her own, [Wis. Stat. § 48.375\(7\)\(c\)1.](#), or that the performance or inducement of the abortion serves the minor's best interests, [Wis. Stat. § 48.375\(7\)\(c\)2.](#) The court must issue an order within three calendar days after the initial appearance unless the minor and her counsel, or the clergy member who filed the petition on behalf of the minor, consent to an extension of the time period. [Wis. Stat. § 48.375\(7\)\(d\)1.](#) The court must first look to the "mature and well-informed" standard in determining whether to allow judicial waiver of the parental consent requirement. If the court decides that the petitioner does not meet that standard, the court then turns to the second standard and evaluates whether a judicial waiver will serve the "minor's best interests." *See supra* § [18.6](#).

### 6. Notification and Delivery of Order [§ 18.11]

An order granting or denying the petitioner's request takes effect immediately upon issuance. [Wis. Stat. § 48.375\(7\)\(d\)1.](#) Counsel or the clergy member must notify the minor immediately and hand-deliver a certified copy of the court order granting the petition to the person who intends to perform the abortion. [Wis. Stat. § 48.375\(7\)\(d\)2.](#) If, with reasonable diligence, counsel or clergy cannot locate that person, then counsel or the clergy member must leave a certified copy with the person's agent at the principal place where the person works. *Id.*

Within 24 hours after the court issues the determination and order, the court must file the findings of fact and conclusions of law with the clerk of court. [Wis. Stat.](#) § 48.375(7)(d)1.

**Practice Tip.** As a practical matter, when counsel or the clergy member receives an order, he or she should write the minor’s name on the order before delivery to ensure that the abortion provider does not confuse orders, since “Jane Doe” is the petitioner on all such orders.

### C. Failure of Court to Act Within Applicable Time Periods [§ 18.12]

If a judge does not act within the applicable time period imposed by the statute, the minor can select a temporary reserve judge to hear the petition. [Wis. Stat.](#) § 48.375(7)(d)1m. The chief judge of the district must comply with this selection. The temporary reserve judge must make a determination and issue an order within two calendar days after assignment to the case. *Id.* The minor and her counsel, or the clergy member who filed the petition, can consent to an extension of the two-day period. All other filing and notification requirements remain the same.

### D. Fees and Costs [§ 18.13]

The court cannot charge the minor any filing fees. [Wis. Stat.](#) § 48.257(6). In addition, any expenses for service of notice or travel expenses or fees allowed under [Wis. Stat.](#) ch. 885 incurred by any person required to appear in a waiver proceeding (other than the minor named in the petition) must be paid by the county where the circuit court that holds the proceeding is located. [Wis. Stat.](#) § 48.273(4)(c).

## IV. [Other Abortion-Related Prohibitions](#) [§ 18.14]

No person may perform or induce, or attempt to perform or induce, an abortion when the unborn child is “considered capable of experiencing pain.” [Wis. Stat.](#) § 253.107(3). An unborn child is considered to be capable of experiencing pain for purposes of [Wis. Stat.](#) § 253.107(3) if the “probable postfertilization age” of the unborn child is 20 or more weeks. [Wis. Stat.](#) § 253.107(3)(a). The *probable postfertilization age of the unborn child* is defined as the number of weeks that have elapsed from the probable time of fertilization of the ovum. [Wis. Stat.](#) § 253.107(1)(c).

In addition, generally no physician may perform or induce an abortion, or attempt to perform or induce an abortion, unless he or she has first determined of the probable postfertilization age of the unborn child or relied on a determination by another physician. [Wis. Stat.](#) § 253.107(2).

Neither requirement described above applies in the case of a “medical emergency.” [Wis. Stat.](#) § 253.107(2), (3). A *medical emergency* is defined as

a condition, in a physician’s reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24-hour delay in performance or inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman’s major bodily functions.

[Wis. Stat.](#) § 253.10(2)(d).

If an abortion is performed under the medical-emergency exception, a physician must

terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless the termination of the pregnancy in that manner poses a greater risk either of the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the woman than other available methods.

[Wis. Stat.](#) § 253.107(3)(b).

**Note.** 2015 Wis. Act 56 created criminal penalties and civil damages for persons who violate the prohibition against performing, inducing, or attempting to perform or induce an abortion when the unborn child is considered capable of experiencing pain. See [Wis. Stat.](#) § 253.107(4), (5). Given that [Dobbs v. Jackson Women’s Health Organization](#), 142 S. Ct. 2228 (2022), has overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883 (1992), and conflicts with some Wisconsin Statutes, see *supra* § 18.2, it is unclear when abortion care is permissible in Wisconsin.



As of the publication of this edition of the *Wisconsin Juvenile Law Handbook*, a pending declaratory-injunction action brought by the Wisconsin Attorney General argues that Wis. Stat. § 940.04 has been superseded by subsequent legislation. Compl., *Kaul v. Kapenga*, No. 2022CV1594 (Wis. Cir. Ct. Dane Cnty. June 28, 2022), [https://www.doj.state.wi.us/sites/default/files/news-media/6.28.22\\_Criminal\\_Abortion\\_Ban\\_Complaint.pdf](https://www.doj.state.wi.us/sites/default/files/news-media/6.28.22_Criminal_Abortion_Ban_Complaint.pdf). Discussion of the penalties and damages associated with abortion care is beyond the scope of this chapter.

## V. Appeals [§ 18.15]

### A. Court of Appeals [§ 18.16]

If the circuit court denies the petition for waiver of parental consent, the minor can either appeal under [Wis. Stat.](#) § 809.105 or file another petition in a different court. See [Wis. Stat.](#) § 48.375(8).

[Wis. Stat.](#) § 809.105 provides the exclusive appellate procedure in these cases. Under the statute, only the minor (or a clergy member acting on the minor's behalf) can initiate an appeal. [Wis. Stat.](#) § 809.105(2). She must file the notice of appeal with the clerk of the trial court. *Id.* Within three calendar days after the filing of the notice of appeal, the clerk of the trial court must transmit all relevant documents to the clerk of the court of appeals. [Wis. Stat.](#) § 809.105(3)(b). The court reporter must file a transcript of the proceeding within two calendar days of the filing of the notice of appeal. [Wis. Stat.](#) § 809.105(5).

Because of the short time limits, the rules do not require any briefs. [Wis. Stat.](#) § 809.105(7). The court of appeals can require oral argument. [Wis. Stat.](#) § 809.105(8m). If the court requires oral argument, the court must conduct the proceeding in chambers or by telephone, unless the minor (through counsel) or the clergy member demands oral argument in open court. *Id.* The court must issue its judgment within four calendar days after the filing of the appeal. [Wis. Stat.](#) § 809.105(8).

A judgment by the court of appeals takes effect immediately. [Wis. Stat.](#) § 809.105(10)(a). If the court reverses the trial court, counsel or the clergy member receives notice by personal service. *Id.* Counsel or the clergy member must then hand-deliver the judgment to the clinic or doctor performing the abortion. [Wis. Stat.](#) § 809.105(10)(b); see also *supra* § 18.11. If the court affirms the trial court, counsel or the clergy member receives notice by personal service and also receives notice of the right to file a petition for review in the supreme court. [Wis. Stat.](#) § 809.105(10)(a).

### B. Supreme Court [§ 18.17]

Under [Wis. Stat.](#) § 809.105(11), an appeal to the supreme court involves essentially the same procedures required in an appeal to the court of appeals. Unlike the court of appeals, however, the supreme court can decide whether to grant the petition for review. [Wis. Stat.](#) § 809.105(11)(b). Further, the petition for review must contain the following:

1. A statement of the issues presented for review and how the trial court and court of appeals decided them;
2. A brief statement explaining the reason for the appeal to the supreme court; and
3. The judgment and opinion of the court of appeals, and the trial court's findings of fact, conclusions of law, and final order furnished to the court of appeals.

[Wis. Stat.](#) § 809.105(11)(a).

### C. Persons Barred from Appellate Proceedings [§ 18.18]

As at the circuit court level, the minor's parents, guardian, legal custodian, foster parents, and adult family members cannot attend any of the appellate proceedings. [Wis. Stat.](#) § 809.105(13).

## VI. [Standard Juvenile Court Forms](#) [§ 18.19]

Following is a list of standard juvenile court forms that might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B](#), *infra*.



**Caution.** The forms listed below have not been updated since the decision in [Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 \(2022\)](#). As explained above, Wisconsin courts have not yet resolved whether the broad ban on abortion under [Wis. Stat. § 940.04](#) is enforceable in the wake of *Dobbs*. See *supra* §§ [18.2](#), [18.14](#).

**Juvenile Court Forms—[Wis. Stat.](#) Chs. 48 and 938  
Wisconsin Records Management Committee**

| Form Number             | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|-------------------------|---------------------------|--|---|
| <a href="#">JC-1620</a> | Ch. 48                    | Petition to waive parental consent for abortion                  | Petition to initiate a children's court proceeding, in which a child is seeking judicial consent to waive the requirement for parental consent to have an abortion                          |
| <a href="#">JC-1621</a> | Ch. 48                    | Affidavit of clergyperson to waive parental consent for abortion | Affidavit, which states that certain statutory requirements have been complied with, must accompany a "petition to waive parental consent for abortion" when it is filed by a clergy member |
| <a href="#">JC-1622</a> | Ch. 48                    | Waiver of immediate notice (parental consent/abortion waivers)   | Form used by pregnant child to waive her right to immediate notice of all court proceedings   |
| <a href="#">JC-1623</a> | Ch. 48                    | Order on waiver of parental consent for abortion                 | Order in which the court, based on certain findings, either grants or denies the petition to waive parental consent for an abortion   |

## Supplement Chapter 19

### Uniform Child Custody Jurisdiction and Enforcement Act

Book section supplemented: [19.1](#)

**Note:** In the opinion of the authors, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2022–23 revision.

#### 19.1 What the Uniform Child Custody Jurisdiction and Enforcement Act Is

[Page 2: Replaced footnote 1](#)

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 272; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-106 (Oct. 4, 2024).

## Chapter 19

# Uniform Child Custody Jurisdiction and Enforcement Act

## I. [What the Uniform Child Custody Jurisdiction and Enforcement Act Is](#)

### [§ 19.1]

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was, in 1997, approved and recommended for passage in all states by the National Conference of Commissioners on Uniform State Laws. In general, the UCCJEA standardizes among all adopting states the procedural and jurisdictional requirements for interstate child custody matters. In Wisconsin, the UCCJEA is codified as [Wis. Stat. ch. 822](#). The UCCJEA replaced the Uniform Child Custody Jurisdiction Act (UCCJA), which Wisconsin had enacted into law in 1975. *See* 2005 Wis. Act 130 (repealing and recreating [Wis. Stat. ch. 822](#)).<sup>1</sup>

The UCCJEA's purposes include preventing jurisdictional battles between states, [Wis. Stat. § 822.01\(2\)\(a\)](#), ensuring that the state best able to decide the child's best interest does so, [Wis. Stat. § 822.01\(2\)\(b\)](#), discouraging the use of the interstate system to continue custody battles, [Wis. Stat. § 822.01\(2\)\(c\)](#), deterring abductions, [Wis. Stat. § 822.01\(2\)\(d\)](#), avoiding relitigation in a state of other states' custody decisions, [Wis. Stat. § 822.01\(2\)\(e\)](#), and facilitating the enforcement of custody decrees, [Wis. Stat. § 822.01\(2\)\(f\)](#).

**Note.** The Parental Kidnapping Prevention Act (PKPA), 28 [U.S.C. § 1738A](#), also governs matters relating to abduction of children. The Wisconsin Supreme Court held that, to the extent that the PKPA and the UCCJA conflicted, the Supremacy Clause of the U.S. Constitution mandated that the PKPA preempt the UCCJA. *Michalik v. Michalik*, 172 Wis. 2d 640, 643, 494 N.W.2d 391 (1993). Based on the rationale in *Michalik*, the PKPA should similarly preempt the UCCJEA, to the extent that the acts continue to contain conflicting provisions.

The UCCJEA defines a *child custody proceeding* as a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. [Wis. Stat. § 822.02\(4\)](#); *see also* [Wis. Stat. § 822.02\(2\)](#) (defining *child* as an individual under 18 years of age). A child custody proceeding includes a proceeding for divorce, legal separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic abuse, in which the issue of legal custody, physical custody, or visitation may appear. [Wis. Stat. § 822.02\(4\)](#).

**Note.** The term “child custody proceeding” does not include proceedings involving juvenile delinquency, contractual emancipation, or enforcement under the UCCJEA. *Id.*

## II. Jurisdiction Under the UCCJEA [§ 19.2]

### A. Initial Child Custody Jurisdiction [§ 19.3]

A Wisconsin court has jurisdiction to make an initial determination in a child custody case, *see* [Wis. Stat. § 822.02\(8\)](#) (defining “initial determination”), (3) (defining “child custody determination”), only if any of the following applies:

1. Wisconsin is the home state of the child at the commencement of the proceeding. [Wis. Stat. § 822.21\(1\)](#).

**Note.** The UCCJEA defines *home state* as the following:

[T]he state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned.... A period of temporary absence of any of the persons mentioned ... is part of the [six-month] period.

[Wis. Stat. § 822.02\(7\)](#). *Commencement* means “the filing of the first pleading in a proceeding, provided that service is completed in accordance with the applicable provisions of [\[Wis. Stat.\] ch. 801](#).” [Wis. Stat. § 822.02\(5\)](#).

2. Wisconsin was the home state of the child within six months before the commencement of the proceedings, and

- a. The child is absent, and

- b. A parent or person acting as parent continues to live in the state. [Wis. Stat. § 822.21\(1\)\(a\)](#).

3. A court of another state does not have jurisdiction or a court of the home state of the child has declined jurisdiction because Wisconsin is the more appropriate forum under [Wis. Stat. § 822.27](#) or [Wis. Stat. § 822.28](#), and
  - a. The child and at least one of the child's parents (or the child and a person acting as a parent) have a significant connection with Wisconsin other than mere physical presence, and
  - b. Substantial evidence is available in Wisconsin concerning the child's care, protection, training, and personal relationships. [Wis. Stat. § 822.21\(1\)\(b\)](#).

**Note.** [Wis. Stat. § 822.27](#) allows a court to decline jurisdiction if the court determines that it is an inconvenient forum. See section [19.8, infra](#), for further discussion of inconvenient forum. [Wis. Stat. § 822.28](#) requires a court to decline jurisdiction if a person seeking to invoke jurisdiction has engaged in unjustifiable conduct. See section [19.9, infra](#), for further discussion of jurisdiction declined by reason of conduct.

4. All courts that have jurisdiction under any of the above criteria have declined to exercise jurisdiction because a court in Wisconsin is the more appropriate forum under [Wis. Stat. § 822.27](#) or [Wis. Stat. § 822.28](#). [Wis. Stat. § 822.21\(1\)\(c\)](#).
5. No court of any other state would have jurisdiction under any of the above criteria. [Wis. Stat. § 822.21\(1\)\(d\)](#).

"Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." [Wis. Stat. § 822.21\(3\)](#). *Child custody determination* is defined as "a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child." It includes "a permanent, temporary, initial, and modification order" but not an order relating to child support or other monetary obligation of a person. [Wis. Stat. § 822.02\(3\)](#).

## B. Exclusive, Continuing Jurisdiction [§ 19.4]

After a Wisconsin court has made a child custody determination, the court has exclusive, continuing jurisdiction over the determination until either of the following occurs:

1. A Wisconsin court determines that neither the child, nor the child and one parent or a person acting as a parent, have a significant connection with Wisconsin and that substantial evidence is no longer available in Wisconsin regarding the child's care, protection, training, and personal relationships. [Wis. Stat. § 822.22\(1\)\(a\)](#).
2. A Wisconsin court or a court of another state has determined that the child, the child's parents, and all persons acting as parents do not presently reside in Wisconsin. [Wis. Stat. § 822.22\(1\)\(b\)](#).

A Wisconsin court that has made a child custody determination and that does not have exclusive, continuing jurisdiction may modify that determination only if it has jurisdiction to make an initial determination. [Wis. Stat. § 822.22\(2\)](#).

## C. Jurisdiction to Modify Determination [§ 19.5]

A Wisconsin court cannot modify a child custody determination made by a court of another state unless a Wisconsin court has jurisdiction to make an initial determination under [Wis. Stat. § 822.21\(1\)\(a\)](#) or (b), and one of the following applies:

1. The court of the other state determines that it no longer has exclusive, continuing jurisdiction or that a Wisconsin court would be a more convenient forum.
2. A Wisconsin court or a court of the other state determines that the child, the child's parents, and all persons acting as parents do not presently reside in the other state.

[Wis. Stat. § 822.23](#). [Wis. Stat. § 822.21\(1\)\(a\)](#) provides for jurisdiction when Wisconsin is the child's home state or was the child's home state within the past six months and a parent or a person acting as a parent continues to live in Wisconsin. [Wis. Stat. § 822.21\(1\)\(b\)](#) provides for jurisdiction when a court of another state does not have jurisdiction or a court of the child's home state has declined jurisdiction because Wisconsin is the more appropriate forum and the child and at least one of the child's parents (or the child and a person acting as a parent) have a significant connection with Wisconsin other than mere physical presence, and substantial evidence is available in Wisconsin concerning the child's care, protection, training, and personal relationships. See *supra* [§ 19.3](#).

## D. Temporary Emergency Jurisdiction [§ 19.6]

A Wisconsin court has temporary emergency jurisdiction when the child is present in Wisconsin and either

1. Has been abandoned; or
2. Needs protection because the child (or a sibling or parent of the child) has been subjected to, or threatened with, mistreatment or abuse.

[Wis. Stat.](#) § 822.24(1).

If there is no previous child custody determination and a child custody proceeding has not been commenced in a court of a state having jurisdiction, any emergency child custody determination remains in effect until an order is obtained from a court of a state having jurisdiction. [Wis. Stat.](#) § 822.24(2). If a proceeding is not commenced in a court of a state having jurisdiction, an emergency child custody determination becomes the final determination if it so provides, and Wisconsin then becomes the home state of the child. *Id.*

If there is a previous child custody determination entitled to be enforced or a child custody proceeding has been commenced in a court of a state having jurisdiction, any emergency order must specify the period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction. [Wis. Stat.](#) § 822.24(3).

A Wisconsin court that is exercising emergency jurisdiction, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under [Wis. Stat.](#) §§ 822.21–.23, *see supra* §§ [19.3–.5](#), must immediately communicate with the other court. [Wis. Stat.](#) § 822.24(4).

Similarly, if a Wisconsin court is exercising jurisdiction under [Wis. Stat.](#) §§ 822.21–.23 and becomes aware that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state exercising temporary emergency jurisdiction, the Wisconsin court must immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period of duration of the temporary order. *Id.*

## III. Declining Jurisdiction [§ 19.7]

### A. Inconvenient Forum [§ 19.8]

Even when a Wisconsin court has jurisdiction to make a child custody determination under the UCCJEA, the court may decline jurisdiction because a court of another state is a more appropriate forum. [Wis. Stat.](#) § 822.27(1).

Before determining whether it is an inconvenient forum, the court must allow the parties to submit information, and it must consider the following factors:

1. Whether domestic violence has occurred and is likely to continue and which state is best able to protect the parties and child, [Wis. Stat.](#) § 822.27(2)(a);
2. The length of time the child has resided outside Wisconsin, [Wis. Stat.](#) § 822.27(2)(b);
3. The distance between the Wisconsin court and the court of the state that would assume jurisdiction, [Wis. Stat.](#) § 822.27(2)(c);
4. The financial circumstances of the parties, [Wis. Stat.](#) § 822.27(2)(d);
5. Any agreement of the parties regarding which state should assume jurisdiction, [Wis. Stat.](#) § 822.27(2)(e);
6. The nature and location of the evidence, including testimony of the child, [Wis. Stat.](#) § 822.27(2)(f);
7. The ability of each court to decide the issue expeditiously and the procedures necessary to present the evidence, [Wis. Stat.](#) § 822.27(2)(g); and
8. The familiarity of each court with the facts and issues of the pending case, [Wis. Stat.](#) § 822.27(2)(h).

The issue of inconvenient forum can be raised by motion of a party, the court's own motion, or the request of another court. [Wis. Stat. § 822.27\(1\)](#). After a Wisconsin court has determined that it is an inconvenient forum and that a court of another state is more appropriate, the court must stay the proceedings on the condition that a proceeding be promptly commenced in another designated state. [Wis. Stat. § 822.27\(3\)](#).

A Wisconsin court can decline to exercise jurisdiction over a child custody determination that is incidental to a divorce or other proceeding but still retain jurisdiction over the divorce or other proceeding. [Wis. Stat. § 822.27\(4\)](#).

## B. Jurisdiction Declined by Reason of Conduct [§ 19.9]

If the court's jurisdiction under the UCCJEA is the result of a person's unjustifiable conduct, the court must decline jurisdiction unless any of the following occurs:

1. The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction. [Wis. Stat. § 822.28\(1\)\(a\)](#).
2. A court of the state otherwise having jurisdiction under [Wis. Stat. §§ 822.21–.23](#), *see supra* §§ [19.3–.5](#), determines that Wisconsin is the more appropriate forum. [Wis. Stat. § 822.28\(1\)\(b\)](#).
3. No court of any other state would have jurisdiction under [Wis. Stat. §§ 822.21–.23](#). [Wis. Stat. § 822.28\(1\)\(c\)](#).

If a Wisconsin court declines to exercise jurisdiction by reason of conduct, the court may tailor a remedy that ensures the safety of the child and prevents a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction. [Wis. Stat. § 822.28\(2\)](#).

**Note.** In *Hatch v. Hatch (In re Custody of K.M.K.)*, 2007 WI App 136, ¶¶ 21–22, 302 Wis. 2d 215, 733 N.W.2d 648, the court of appeals held that crossing state lines while pregnant, without more, is not “unjustifiable conduct” under [Wis. Stat. § 822.28](#).

If the court dismisses a petition or stays a proceeding because it declines jurisdiction based on unjustifiable conduct, the court must assess against the party seeking to invoke jurisdiction necessary and reasonable expenses, unless that party establishes that the assessment is inappropriate. [Wis. Stat. § 822.28\(3\)](#). Necessary and reasonable expenses include costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and expenses for child care during the course of the proceedings. *Id.* The court cannot assess the fees, costs, or expenses against the state unless authorized by some other law. *Id.*

## IV. Procedure [§ 19.10]

### A. Information Submitted to the Court [§ 19.11]

In its first pleading or in an attached affidavit, each party must give information, under oath, as to the child's present address, the places where the child has lived during the past five years, and the names and addresses of the persons with whom the child has lived during that time. [Wis. Stat. § 822.29\(1\)](#).

In addition, the pleading or affidavit must state whether the party

1. Has participated, as a party or witness or in any other capacity, in any other proceeding related to the custody of or physical placement or visitation with the child, [Wis. Stat. § 822.29\(1\)\(a\)](#);

**Note.** If the party has participated in such other proceeding, the pleading or affidavit must also include the court, case number, and date of the child custody determination. *Id.*

2. Knows of any proceeding that could affect the current proceeding, including proceedings related to enforcement, domestic violence, protective orders, termination of parental rights, and adoptions, [Wis. Stat. § 822.29\(1\)\(b\)](#); or

**Note.** If the party knows of such other proceeding, the pleading or affidavit must also include the court, case number, and nature of the proceeding. *Id.* The parties also have a continuing duty to inform the court of any proceeding in Wisconsin or any other state that could affect the current proceeding. [Wis. Stat. § 822.29\(4\)](#).

3. Knows the name and address of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child, [Wis. Stat. § 822.29\(1\)\(c\)](#).

**Note.** If a party does know the names and addresses of such persons, the party's pleading or affidavit must provide those names and addresses. *Id.* In light of the expansion of grandparental rights, as well as rights of same-sex partners, this information could include persons not ordinarily or legally considered parties. *See generally* [Wis. Stat. § 767.43\(1\)](#) (visitation rights of grandparents); [Holtzman v. Knott \(In re Custody of H.S.H.-K.\)](#), 193 Wis. 2d 649, 533 N.W.2d 419 (1995) (holding that same-sex partner may petition for visitation rights).

The court may examine the parties under oath as to details of any of the above information that is furnished. [Wis. Stat. § 822.29\(3\)](#). If any of the information described above is not provided, the court may stay the proceeding until the information is provided. [Wis. Stat. § 822.29\(2\)](#). The stay can be requested by motion of a party or the court. *Id.*

A party may allege in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information. [Wis. Stat. § 822.29\(5\)](#). If such an allegation is made, the information must be sealed and cannot be disclosed to the other party or the public unless the court orders the disclosure after a hearing during which the court considers the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice. *Id.*

## B. Appearance of Parties and Child [§ 19.12]

In a child custody proceeding in Wisconsin, the court can order a party who is in Wisconsin to appear before the court in person with or without the child. [Wis. Stat. § 822.295\(1\)](#). The court can also order a person who is in Wisconsin who has physical custody or control of the child to appear in person with the child. *Id.*

If a party to the proceeding is outside Wisconsin, the court can order that notice be given under [Wis. Stat. § 822.08](#). [Wis. Stat. § 822.295\(2\)](#). [Wis. Stat. § 822.08](#) permits notice to persons outside Wisconsin to be given in a manner that follows either Wisconsin law for service of process or the law of the state in which the service is made.

**Note.** Under [Wis. Stat. § 822.08\(3\)](#), notice is not required to a person who submits to the jurisdiction of the court.

## C. Simultaneous Proceedings [§ 19.13]

If a child custody proceeding has been commenced in another state, a Wisconsin court cannot exercise its jurisdiction under the UCCJEA unless the proceeding in the other state has been terminated or is stayed by the court of the other state because a Wisconsin court is a more convenient forum. [Wis. Stat. § 822.26\(1\)](#); *see supra* § 19.8.

Likewise, if before hearing a child custody proceeding, a Wisconsin court determines that a child custody proceeding has been commenced in another state, the Wisconsin court must stay its proceedings and communicate with the court of the other state. [Wis. Stat. § 822.26\(2\)](#). If the court of the other state does not determine that a Wisconsin court is the more appropriate forum, the Wisconsin court must dismiss the proceeding. *Id.*

Regarding proceedings to modify a child custody determination, if a proceeding to enforce a child custody determination has been commenced in another state, the court may do any of the following:

1. Stay the modification proceeding pending the entry of an order in the other state to enforce, stay, deny, or dismiss the enforcement proceeding, [Wis. Stat. § 822.26\(3\)\(a\)](#);
2. Enjoin the parties from continuing the enforcement proceeding, [Wis. Stat. § 822.26\(3\)\(b\)](#); or
3. Proceed with the modification under conditions the court finds appropriate, [Wis. Stat. § 822.26\(3\)\(c\)](#).

## V. Enforcement [§ 19.14]

### A. Duty to Enforce [§ 19.15]



A Wisconsin court must recognize and enforce a child custody determination of a court of another state if the other state exercised jurisdiction in substantial conformity with the UCCJEA. [Wis. Stat. § 822.33\(1\)](#).

## B. Registration of Child Custody Determination [§ 19.16]

A child custody determination issued by a court of another state can be registered in Wisconsin by sending all of the following information to the clerk of any circuit court:

1. A letter requesting certification, [Wis. Stat. § 822.35\(1\)\(a\)](#);
2. Two copies of the determination—one of which must be a certified copy—along with a statement indicating that to the best of the knowledge of the person seeking registration, the determination has not been modified, [Wis. Stat. § 822.35\(1\)\(b\)](#); and
3. The name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody, physical placement, or visitation in the determination, [Wis. Stat. § 822.35\(1\)\(c\)](#).

**Note.** If a party alleges in an affidavit or under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed unless the court orders disclosure after a hearing. [Wis. Stat. § 822.29\(5\)](#).

When the court receives a request to register a determination, the court must file the determination as a foreign judgment and send notice to the parent or person acting as a parent who has been awarded custody, physical placement, or visitation in the determination. [Wis. Stat. § 822.35\(2\)\(a\)](#), (b). If the parent or person acting as a parent wishes to contest the validity of the registered determination, he or she must request a hearing within 20 days after service. [Wis. Stat. § 822.35\(3\)\(b\)](#).

At the hearing, the court must confirm the registered determination unless the person contesting the registration establishes any of the following:

1. The issuing court did not have jurisdiction. [Wis. Stat. § 822.35\(4\)\(a\)](#).
2. The determination has been vacated, stayed, or modified. [Wis. Stat. § 822.35\(4\)\(b\)](#).
3. The person contesting registration was entitled to notice, but notice was not given in the proceeding before the court that issued the determination. [Wis. Stat. § 822.35\(4\)\(c\)](#).

## C. Expedited Enforcement of Child Custody Determination [§ 19.17]

A petition for enforcement of a child custody proceeding must state all of the following:

1. Whether the court that issued the determination identified the jurisdictional basis it relied on and, if so, what the basis was, [Wis. Stat. § 822.38\(2\)\(a\)](#);
2. Whether the determination has been vacated, stayed, or modified and, if so, the court, the case number, and the nature of the proceeding, [Wis. Stat. § 822.38\(2\)\(b\)](#);
3. Whether any proceeding has been commenced that could affect the enforcement proceeding, including proceedings relating to domestic violence, protective orders, determination of parental rights, and adoptions, and, if so, the court, the case number, and the nature of the proceeding, [Wis. Stat. § 822.38\(2\)\(c\)](#);
4. The present physical address of the child and the respondent, [Wis. Stat. § 822.38\(2\)\(d\)](#), i.e., the person against whom the enforcement proceeding has been commenced, *see* [Wis. Stat. § 822.31\(3\)](#);
5. Whether relief in addition to the immediate physical custody of the child and attorney fees, is sought (including a request for assistance from law enforcement officials) and, if so, the relief sought, [Wis. Stat. § 822.38\(2\)\(e\)](#);
6. If the child custody determination has been registered and confirmed, the date and place of registration, [Wis. Stat. § 822.38\(2\)\(f\)](#); *see supra* § [19.16](#).

Upon the filing of the petition, the court must issue an order directing the respondent to appear in person with or without the child at a hearing to be held the next “judicial day,” after service of the order or, if that is not possible, the first judicial day possible. [Wis. Stat. § 822.38\(3\)](#). *Judicial day* means each day except Saturday, Sunday, or legal holidays. [Wis. Stat. § 822.31\(1\)](#).

The order must also advise the respondent that at the hearing the court will order that the petitioner can take immediate physical custody of the child unless the respondent appears and establishes one of the following:

1. The child custody determination has not been registered and confirmed because
  - a. The issuing court did not have proper jurisdiction;
  - b. The child custody determination has been vacated, stayed, or modified; or
  - c. The respondent was entitled to notice, but notice was not given properly in the proceedings before the court that issued the child custody determination. [Wis. Stat. § 822.38\(4\)\(a\)1., 2., 3.](#)
2. The child custody determination was registered and confirmed but has been vacated, stayed, or modified. [Wis. Stat. § 822.38\(4\)\(b\)](#).

#### D. Warrant to Take Physical Custody of Child [§ 19.18]

When filing a petition seeking enforcement of a child custody determination, the petitioner can ask for a warrant to take physical custody of the child if the child is imminently likely to suffer serious physical harm or be removed from Wisconsin. [Wis. Stat. § 822.41\(1\)](#).

When the court issues a warrant to take physical custody of the child, the warrant must do all of the following:

1. Recite the facts on which a conclusion of imminent serious physical harm or removal from the state is based, [Wis. Stat. § 822.41\(3\)\(a\)](#);
2. Direct law enforcement officers to immediately take physical custody of the child, [Wis. Stat. § 822.41\(3\)\(b\)](#); and

**Note.** The court can authorize law enforcement officer to enter private property and to use forcible entry at any hour to take physical custody of the child. [Wis. Stat. § 822.41\(5\)](#).

3. Provide for the placement of the child pending final relief, [Wis. Stat. § 822.41\(3\)\(c\)](#).

#### VI. Conclusion [§ 19.19]

Generally, the UCCJEA provides clear standards for original jurisdiction in child custody proceedings and for jurisdiction to modify child custody determinations. The UCCJEA also includes standards for continuing jurisdiction over child custody determinations, for temporary emergency jurisdiction over child custody matters, and for the enforcement of child custody determinations.

#### VII. Standard Juvenile Court Forms [§ 19.20]

Following is a standard juvenile court form might be useful in cases involving the material discussed in this chapter. For a more complete list of standard juvenile court forms, see [appendix B, infra](#).

##### Juvenile Court Forms—[Wis. Stat. Chs. 48 and 938](#) Wisconsin Records Management Committee

| Form Number            | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose  |
|------------------------|---------------------------|--|--|
| <a href="#">GF-150</a> | Ch. 48                    | Uniform Child Custody Jurisdiction and Enforcement Act Affidavit | Sworn statement with information to meet jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act |

---

# Appendices

---

## [A Chart](#)

- Procedure Under Wis. Stat. Ch. 938

## [B Lists of Standard Juvenile Court Forms](#)

- List of Wis. Stat. Ch. 48 Standard Juvenile Court Forms
- List of Wis. Stat. Ch. 938 Standard Juvenile Court Forms
- List of Indian Child Welfare Act Standard Juvenile Court Forms

---

# Appendix A

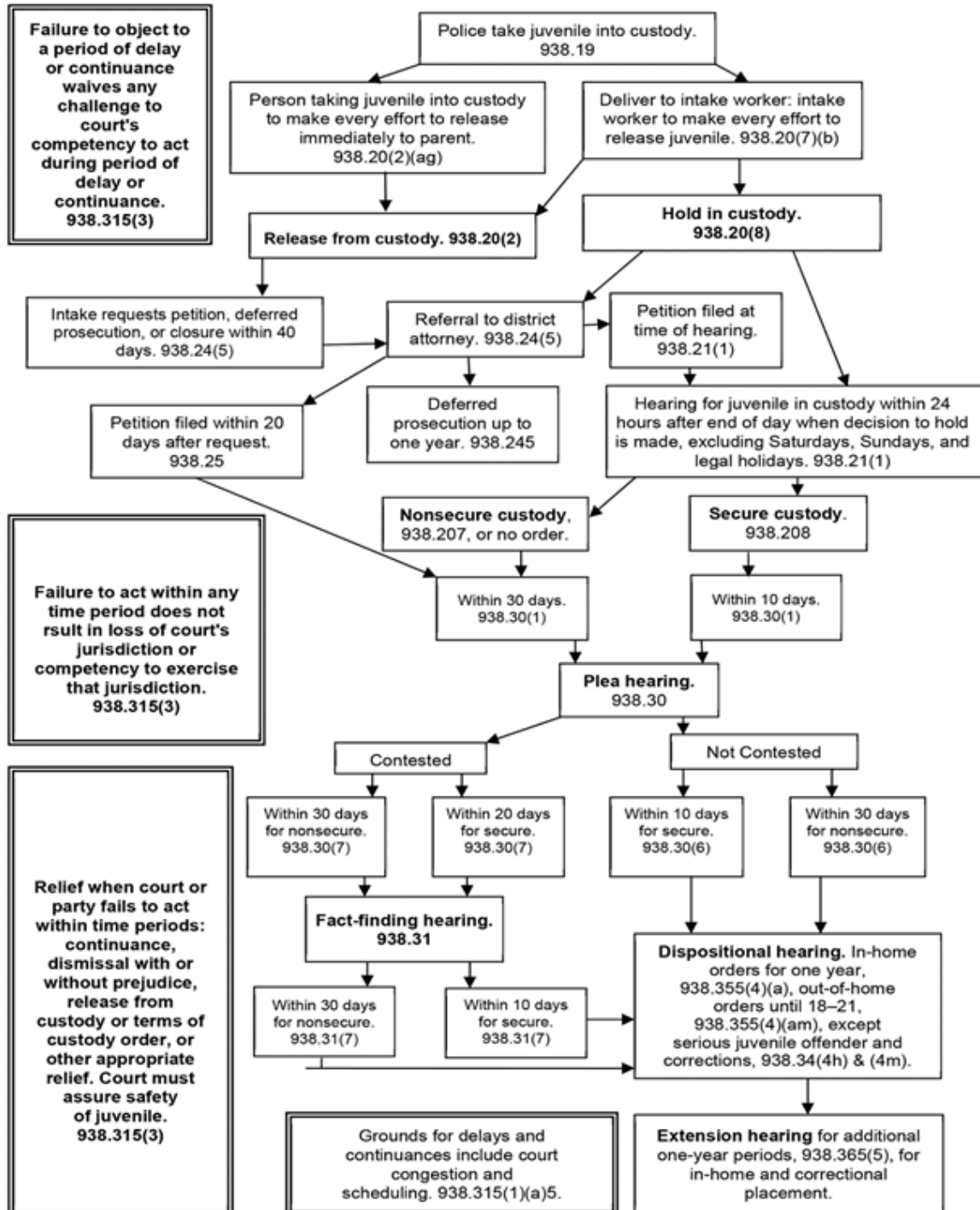
---

# Chart

## Procedure Under Wis. Stat. Ch. 938

### Procedure Under Wis. Stat. Ch. 938

Adapted from a chart designed by David N. Zerwick and revised by Samuel W. Benedict and Gina M. Pruski,  
Office of the State Public Defender.











## Appendix B

### Lists of Standard Juvenile Court Forms

List of Wis. Stat. Ch. 48 Standard Juvenile Court Forms..... App. B-3

List of Wis. Stat. Ch. 938 Standard Juvenile Court Forms..... App. B-13

List of Indian Child Welfare Act Standard Juvenile Court Forms..... App. B-23

**NOTE:** Most of the standard juvenile court forms listed in this appendix are available through the Wisconsin Court System's website, <https://www.wicourts.gov/forms1/circuit.htm>. For forms specifically related to intake, see the Wisconsin Juvenile Court Intake Association's website, <https://wjcia.org/Court-Forms>.

#### Juvenile Court Forms—Wis. Stat. Ch. 48 Wisconsin Records Management Committee

| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form   | Purpose   |
|--------------------------|---------------------------|--|---|
| <a href="#">GF-131A</a>  | Ch. 48                    | Order appointing guardian ad litem or attorney   | Order appointing either a guardian ad litem or an attorney for an individual  |
| <a href="#">GF-131B</a>  | Ch. 48                    | Consent to Act   | Form for attorney to consent to act as guardian ad litem or attorney for an individual  |
| <a href="#">GF-150</a>   | Ch. 48                    | Uniform Child Custody Jurisdiction and Enforcement Act affidavit                               | Sworn statement with information to meet jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act                                    |
| <a href="#">GF-152A</a>  | Ch. 48                    | Petition for appointment of an attorney, affidavit of indigency                                | Petition used to seek appointment of an attorney at county expense after individual has been deemed not indigent under state public defender guidelines               |
| <a href="#">GF-152B</a>  | Ch. 48                    | Order on petition for appointment of an attorney   | Order for appointment of an attorney  |
| <a href="#">JC-1608</a>  | Ch. 48                    | Temporary physical custody request (Ch. 48)  | Request for temporary physical custody of child or expectant mother and record of custody decision by intake worker in a <a href="#">Wis. Stat.</a> ch. 48 proceeding |
| <a href="#">JD-1609</a>  | Ch. 48                    | Temporary physical custody request supplement (Ch. 48)   | Form to provide additional information to the court when requesting temporary physical custody of a child in a <a href="#">Wis. Stat.</a> ch. 48 proceeding           |
| <a href="#">JC-1610</a>  | Ch. 48                    | Petition for protection or services (Ch. 48)   | Formal request to invoke the court's jurisdiction to adjudicate a child in need of protection or services under <a href="#">Wis. Stat.</a> ch. 48                     |
| <a href="#">JC-1611</a>  | Ch. 48                    | Dispositional order—protection or services (Ch. 48)  | Formal court order detailing the disposition in a CHIPS case  |
| <a href="#">JC-1611T</a> | Ch. 48                    | Dispositional order—protection or services with termination of parental rights notice (Ch. 48) | Court order detailing the disposition in a JIPS case with TPR warnings  |

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>   |
|-------------------------|----------------------------------|--|--|
| <a href="#">JC-1612</a> | Ch. 48                           | Petition for protection or care of an unborn child (Ch. 48)                                | Petition for protection or care of an unborn child   |
| <a href="#">JC-1620</a> | Ch. 48                           | Petition to waive parental consent for abortion  | Petition to initiate a children's court proceeding, in which a child is seeking judicial consent to waive the requirement for parental consent to have an abortion   |
| <a href="#">JC-1621</a> | Ch. 48                           | Declaration of clergyperson to waive parental consent for abortion                         | Declaration, which states that certain statutory requirements have been complied with, must accompany a "petition to waive parental consent for abortion" when it is filed by a clergy member                                |
| <a href="#">JC-1622</a> | Ch. 48                           | Waiver of immediate notice (parental consent/abortion waivers)                             | Form used by pregnant child to waive her right to immediate notice of all court proceedings  |
| <a href="#">JC-1623</a> | Ch. 48                           | Order on waiver of parental consent for abortion   | Order in which the court, based on a finding whether the child is mature and well-informed enough to make her own decision about an abortion, either grants or denies the petition to waive parental consent for an abortion |
| <a href="#">JC-1630</a> | Ch. 48                           | Petition for termination of parental rights  | Petition to initiate a proceeding to terminate the parental rights of a parent   |
| <a href="#">JC-1631</a> | Ch. 48                           | Notice of medical information and birth/adoptive parent identifying information disclosure | Notice to inform birth parents that certain medical information be disclosed   |
| <a href="#">JC-1633</a> | Ch. 48                           | Summons (termination of parental rights)   | Notice to parents that a petition to terminate parental rights has been filed and that parents must appear in court for a hearing  |
| <a href="#">JC-1634</a> | Ch. 48                           | Consent to use mother's name for publication   | Authorization by mother to use her name in the notice when publication is required for a termination of parental rights petition   |
| <a href="#">JC-1635</a> | Ch. 48                           | Notice and order of hearing (for publication)  | Notice to parents who cannot otherwise be served that a petition to terminate parental rights has been filed and order to summons the parents to court for a hearing   |
| <a href="#">JC-1636</a> | Ch. 48                           | Consent to termination of parental rights (affidavit)                                      | Affidavit by a parent consenting to the termination of parental rights to a child  |
| <a href="#">JC-1637</a> | Ch. 48                           | Consent to termination of parental rights (judicial)                                       | Consent form signed by a parent before a judicial officer consenting to the termination of parental rights to a child  |
| <a href="#">JC-1638</a> | Ch. 48                           | Order concerning termination of parental rights (voluntary)                                | Order formally indicating the court's decision on a petition to voluntarily terminate the parental rights of a parent  |
| <a href="#">JC-1639</a> | Ch. 48                           | Order concerning termination of parental rights (involuntary)                              | Order formally indicating the court's decision on a petition to terminate the parental rights of a parent  |

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>   |
|-------------------------|----------------------------------|--|--|
| <a href="#">JC-1640</a> | Ch. 48                           | Petition for adoptive placement  | Petition to seek the court's approval for the placement of a child in a home for an adoption   |
| <a href="#">JC-1641</a> | Ch. 48                           | Order for hearing and investigation (adoptive placement/adoption)  | Court order directing a hearing and investigation for an adoptive placement or adoption  |
| <a href="#">JC-1642</a> | Ch. 48                           | Order for adoptive placement   | Order placing a child in a proposed adoptive home for preadoption purposes   |
| <a href="#">JC-1643</a> | Ch. 48                           | Order for hearing and screening (stepparent adoption)  | Court order directing a single-interview screening for stepparent adoption   |
| <a href="#">JC-1644</a> | Ch. 48                           | Notice of right to seek postdisposition relief (termination of parental rights)  | Notice to parents of time limits for postdisposition relief  |
| <a href="#">JC-1645</a> | Ch. 48                           | Petition for minor child adoption  | Petition to the court requesting the court approve an adoption of a minor child  |
| <a href="#">JC-1646</a> | Ch. 48                           | Consent to adoption  | Form signed by a child over 14 and an adult consenting to the adoption   |
| <a href="#">JC-1647</a> | Ch. 48                           | Order on petition for minor child adoption   | Court order granting or denying adoption petition  |
| <a href="#">JC-1648</a> | Ch. 48                           | Priority placement order (Interstate Compact on the Placement of Children)   | Court order for an interstate compact home study to allow placement of a child to another state  |
| <a href="#">JC-1650</a> | Ch. 48                           | Petition for an order for registration of a foreign adoption order   | Petition to request court order for registration of foreign adoption order   |
| <a href="#">JC-1651</a> | Ch. 48                           | Order registering a foreign adoption order   | Court order for registration of a foreign adoption order   |
| <a href="#">JC-1660</a> | Ch. 48                           | Order for temporary physical custody—expectant mother and unborn child   | Court order for temporary physical placement of expectant mother and unborn child  |
| <a href="#">JC-1661</a> | Ch. 48                           | Dispositional order—protection or care of an unborn child  | Dispositional order for temporary physical custody of expectant mother and unborn child  |
| <a href="#">JC-1664</a> | Ch. 48                           | Notice of post-termination of parental rights change in placement  | Notice to the court of a proposed or emergency change in placement of a child under guardianship of an agency or department after termination of parental rights |
| <a href="#">JC-1665</a> | Ch. 48                           | Order for post-termination of parental rights change in placement  | Court order for change in placement of a child under guardianship after termination of parental rights   |
| <a href="#">JC-1690</a> | Ch. 48                           | Petition in juvenile court for temporary restraining order and/or petition and motion for injunction hearing (child abuse) | Petition for juvenile court order to restrain somebody from committing child abuse and to schedule a hearing on an injunction                                    |
| <a href="#">JC-1691</a> | Ch. 48                           | Temporary restraining order and notice of injunction hearing (child abuse)   | Formal order of the court on the petition for a TRO (child abuse) and notice of hearing on an injunction   |

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|-------------------------|----------------------------------|---|--|
| <a href="#">JC-1692</a> | Ch. 48                           | Injunction in juvenile court (child abuse)  | Formal document granting injunction (child abuse)  |
| <a href="#">JC-1693</a> | Ch. 48                           | Petition in juvenile court for temporary restraining order and/or petition and motion for injunction hearing (harassment) | Petition in juvenile court initiating an action for a TRO or final injunction in harassment matters  |
| <a href="#">JD-1700</a> | Both                             | Notice of permanency hearing  | Notice to all interested persons of the permanency hearing   |
| <a href="#">JD-1709</a> | Both                             | Juvenile court minutes  | Minutes of the events and outcome of juvenile court proceedings  |
| <a href="#">JD-1711</a> | Both                             | Order for temporary physical custody (secure/nonsecure)   | Court order directing custody ordered by the court for a child/juvenile  |
| <a href="#">JD-1712</a> | Both                             | Waiver of participation in nonsecure physical custody hearing   | Child/juvenile or parent/guardian/legal custodian waiver of participation in a nonsecure physical custody hearing to challenge or review placement   |
| <a href="#">JD-1716</a> | Both                             | Notice of rights and obligations  | Notice to child/juvenile and parents of their basic rights and obligations and possibility of disclosure of personal information to victims  |
| <a href="#">JD-1717</a> | Both                             | Order to provide statement of income, assets, debts and living expenses   | Court order to parents to provide a statement of income, assets, debts, and living expenses; required when a child may be placed outside the home in a court proceeding or when otherwise appropriate  |
| <a href="#">JD-1718</a> | Both                             | Statement of income, assets, debts and living expenses  | Statement to provide financial information to the court; used when a child may be placed outside the home in a court proceeding or when otherwise appropriate  |
| <a href="#">JD-1720</a> | Both                             | Summons   | Formal notice to an individual to appear in court and to respond to a citation or petition   |
| <a href="#">JD-1724</a> | Both                             | Notice of hearing (juvenile)  | Notice informing individuals involved in a case of a scheduled court proceeding  |
| <a href="#">JD-1725</a> | Both                             | Notice to school board  | Notice to school board of the filing of a felony delinquency petition; adjudication of delinquency, or school attendance as condition of a CHIPS, JIPS, or delinquency dispositional order; and other information required to be provided the school board |
| <a href="#">JD-1729</a> | Both                             | Petition to vacate consent decree and waiver of hearing   | Petition to vacate a consent decree and waive rights to a hearing  |
| <a href="#">JD-1730</a> | Both                             | Order on petition vacating consent decree and reinstating proceedings   | Order for termination of a consent decree and reinstatement of the proceedings   |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|--------------------------|----------------------------------|---|--|
| <a href="#">JD-1731</a>  | Both                             | Petition for examination or assessment                                  | Form for interested person to request the court to order a physical, psychological, mental, or developmental examination or AODA assessment of a child/juvenile/parent/guardian/legal custodian                                  |
| <a href="#">JD-1732</a>  | Both                             | Order for examination or assessment                                     | Court findings and order directing that a physical, psychological, mental, or developmental examination or AODA assessment take place concerning a child/juvenile/parent/guardian/legal custodian                                |
| <a href="#">JD-1734A</a> | Both                             | Consent of child/juvenile to medical services                           | Child/juvenile's consent for medical services  |
| <a href="#">JD-1734B</a> | Both                             | Medical authorization   | Court authorization for a child/juvenile's medical services  |
| <a href="#">JD-1735</a>  | Both                             | Plea questionnaire/waiver of rights (CHIPS and JIPS)                    | Statement signed by child, juvenile, parent, guardian, legal custodian, or Indian custodian entering an admission or no contest plea in a CHIPS or JIPS case and indicating an understanding of the rights waived by such a plea |
| <a href="#">JD-1736</a>  | Both                             | Waiver of right to attorney (child/juvenile)                            | Statement signed by a child/juvenile formally giving up the right to an attorney   |
| <a href="#">JD-1738A</a> | Both                             | Request to inspect juvenile court records                               | Standardized form for requesting access to juvenile court records, as well as providing a record of the request  |
| <a href="#">JD-1738B</a> | Both                             | Order on request to inspect juvenile court records                      | Court order to allow access to juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed  |
| <a href="#">JD-1739A</a> | Both                             | Request and authorization to open juvenile court records for inspection | Standardized form for authorization by certain parties to access child/juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed      |
| <a href="#">JD-1739B</a> | Both                             | Order on request to open juvenile court records for inspection          | Court order to open juvenile court records for inspection  |
| <a href="#">JD-1748</a>  | Both                             | Order dismissing petition   | Formal order dismissing petition in juvenile court   |
| <a href="#">JD-1752</a>  | Both                             | Notice of right to seek postdisposition relief (CHIPS and JIPS)         | Notice to parent of time limits for postdisposition relief   |
| <a href="#">JD-1753</a>  | Both                             | Notice concerning grounds to terminate parental rights                  | Notice to a parent or expectant mother of the possible grounds for termination of parental rights when a child/juvenile or expectant mother is placed outside the home or a parent is denied visitation rights                   |



| Form Number              | Ch. 48, Ch. 938, or Both? | Name of Form  | Purpose   |
|--------------------------|---------------------------|---|---|
| <a href="#">JD-1754</a>  | Both                      | Notice of change in placement (out-of-home to out-of-home/out-of-home to in-home/in-home to in-home)                    | Notice to interested persons that a change in placement has taken or will take place  |
| <a href="#">JD-1762</a>  | Both                      | Order for recoupment of costs of legal services   | Court order directing the parents to reimburse state for costs of legal services provided to child/juvenile by publicly paid attorney   |
| <a href="#">JD-1763A</a> | Both                      | Public Defender response concerning recoupment  | State Public Defender's response to the court concerning a parent's request for an indigency determination  |
| <a href="#">JD-1763B</a> | Both                      | Order concerning recoupment   | Court order concerning a parental request for an indigency determination  |
| <a href="#">JD-1765</a>  | Both                      | Order granting temporary extension  | Order by court granting a request for a temporary extension of an unexpired dispositional order until a hearing can be held on a petition to extend   |
| <a href="#">JD-1766</a>  | Both                      | Request to change placement/revise dispositional order  | Request to change placement of the child/juvenile or revise the dispositional order   |
| <a href="#">JD-1767</a>  | Both                      | Notice of postdisposition emergency change in placement and hearing request (in-home to out-of-home)                    | Notice to child, parent, and other interested parties of emergency change in placement and request for hearing in postdispositional case under <a href="#">Wis. Stat.</a> ch. 48 or 938                             |
| <a href="#">JD-1768T</a> | Both                      | Postdisposition emergency change in placement order with termination of parental rights notice (in-home to out-of-home) | Court order for emergency change from in-home to out-of-home placement in postdispositional case under <a href="#">Wis. Stat.</a> ch. 48 or 938, with TPR notice  |
| <a href="#">JD-1775</a>  | Both                      | Order terminating consent decree/dispositional order  | Court order terminating the consent decree or dispositional order   |
| <a href="#">JD-1782</a>  | Both                      | Order for payment of guardian ad litem fees and expenses for child/juvenile   | Order for payment or reimbursement of guardian ad litem and expert witness fees and expenses for a child or juvenile under <a href="#">Wis. Stat.</a> chs. 48 and 938   |
| <a href="#">JD-1783A</a> | Both                      | Stipulation to revise dispositional order   | Stipulation to revise a dispositional order   |
| <a href="#">JD-1783B</a> | Both                      | Order on stipulation to revise dispositional order  | Final order approving stipulation to revise a dispositional order   |
| <a href="#">JD-1784A</a> | Both                      | Stipulation for consent decree (in-home placement only)   | Agreement between parties requiring certain actions or activities to be done in exchange for suspending formal proceedings  |
| <a href="#">JD-1784B</a> | Both                      | Consent decree (in-home placement only)   | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings; court official approves the consent decree and orders the parties to comply with it |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>  |
|--------------------------|----------------------------------|--|---|
| <a href="#">JD-1785A</a> | Both                             | Stipulation for consent decree (out-of-home placement only)  | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings  |
| <a href="#">JD-1785B</a> | Both                             | Consent decree (out-of-home placement only)  | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings; court official approves the consent decree and orders the parties to comply with it |
| <a href="#">JD-1786</a>  | Both                             | Order for revision of dispositional order  | Order granting or denying request for revision of dispositional order   |
| <a href="#">JD-1786T</a> | Both                             | Order for revision of dispositional order with termination of parental rights notice   | Order revising dispositional order, with TPR notice   |
| <a href="#">JD-1787</a>  | Both                             | Order for extension of dispositional order or consent decree (in-home placement only)  | Order granting or denying request for extension of a dispositional order or consent decree for in-home placement only   |
| <a href="#">JD-1788</a>  | Both                             | Order for extension of dispositional order or consent decree (out-of-home placement only)  | Order granting or denying request for extension of a dispositional order or consent decree for correctional and certain out-of-home placements  |
| <a href="#">JD-1788T</a> | Both                             | Order for extension of dispositional order or consent decree with termination of parental rights notice (out-of-home placement only) | Order of the court extending a dispositional order or consent decree for correctional and certain out-of-home placements, with TPR notice   |
| <a href="#">JD-1789T</a> | Both                             | Order for change in placement with termination of parental rights notice (in-home to out-of-home placement only)                     | Order to change placement from the juvenile's or child's home to an out-of-home placement   |
| <a href="#">JD-1790T</a> | Both                             | Order for change in placement with termination of parental rights notice (out-of-home to out-of-home placement only)                 | Order to change placement from one out-of-home to another out-of-home placement   |
| <a href="#">JD-1791</a>  | Both                             | Permanency hearing order   | Order to approve, disapprove, or revise the permanency plan   |
| <a href="#">JD-1791T</a> | Both                             | Permanency hearing order with termination of parental rights notice  | Court order to approve, disapprove, or revise the permanency plan, with TPR notice  |
| <a href="#">JD-1792</a>  | Both                             | Order for change in placement (out-of-home to in-home placement only)  | Order to change placement from out-of-home to in-home placement   |
| <a href="#">JD-1793</a>  | Both                             | Order for change in placement (in-home to in-home placement only)  | Court order for change of placement from in-home to in-home placement   |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>   |
|--------------------------|----------------------------------|--|--|
| <a href="#">JD-1798A</a> | Both                             | Order appointing guardian ad litem or attorney (Chs. 48 and 938)   | Order to appoint either attorney or guardian ad litem for an individual in a <a href="#">Wis. Stat.</a> ch. 48 or 938 proceeding   |
| <a href="#">JD-1798B</a> | Both                             | Consent to act as guardian ad litem or attorney (Chs. 48 and 938)  | Consent to act as guardian ad litem or attorney for an individual in a <a href="#">Wis. Stat.</a> ch. 48 or 938 proceeding   |
| <a href="#">JD-1799</a>  | Both                             | Statement of guardian ad litem (Chs. 48 and 938)   | Written statement by guardian ad litem regarding the completion of duties required in CHIPS and JIPS cases   |
| <a href="#">JD-1800</a>  | Both                             | Request to extend consent decree   | Notice to all interested persons of request for extension of consent decree  |
| <a href="#">JD-1801</a>  | Both                             | Notice and request for trial reunification, extension of trial reunification, or revocation of trial reunification | Notice and request by caseworker for trial reunification, extension of a trial reunification, or revocation of a trial reunification   |
| <a href="#">JD-1802</a>  | Both                             | Order for trial reunification  | Court order for trial reunification  |
| <a href="#">JD-1803</a>  | Both                             | Order for extension of trial reunification   | Court order for extension of trial reunification   |
| <a href="#">JD-1804</a>  | Both                             | Order for revocation of trial reunification  | Court order for revocation of trial reunification  |
| <a href="#">JD-1805</a>  | Both                             | Order granting temporary extension of trial reunification  | Court order for temporary extension of trial reunification   |
| <a href="#">JD-1806</a>  | Both                             | Request for transition to discharge hearing  | Request that the court hold a transition to discharge hearing before the termination date of an order for out-of-home care   |
| <a href="#">JD-1810</a>  | Both                             | Petition for voluntary transition to independent living agreement  | Request for voluntary transition to independent living agreement and notice of hearing   |
| <a href="#">JD-1811</a>  | Both                             | Order on petition for voluntary transition to independent living agreement   | Order granting or denying petition for voluntary transition to independent living agreement  |
| <a href="#">JD-1814</a>  | Both                             | Request for case closure order   | Request for case closure order in postdispositional case under <a href="#">Wis. Stat.</a> ch. 48 or 938 when child or juvenile is or will be placed with a parent and entry of an original family court order or modification of an existing family court order with regard to paternity, legal custody, physical placement, visitation, child support, or payment of health-care expenses |

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>  |
|-------------------------|----------------------------------|--|---|
| <a href="#">JD-1815</a> | Both                             | Case closure order   | Order denying or granting request to terminate dispositional order in a juvenile court case under <a href="#">Wis. Stat.</a> ch. 48 or 938 when the child or juvenile is placed with a parent and to enter an original family court order or modify an existing family court order with regard to paternity, legal custody, physical placement, visitation, child support, or payment of health-care expenses |
| <a href="#">JD-1820</a> | Both                             | Confidential foster parent information                                   | Document to keep foster parent information confidential   |
| <a href="#">JD-1825</a> | Both                             | Affidavit of service (Ch. 48 and 938)                                    | Affidavit of service  |
| <a href="#">JD-1826</a> | Both                             | Request for qualified residential treatment program placement findings   | Request for court to make required findings concerning placement or proposed placement of child or juvenile in qualified residential treatment program  |
| <a href="#">JD-1827</a> | Both                             | Findings and order for qualified residential treatment program placement | Record of court findings concerning placement or proposed placement of child or juvenile in qualified residential treatment program and order approving or disapproving the placement   |

**Juvenile Court Forms—Wis. Stat. Ch. 938**  
**Wisconsin Records Management Committee**

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>  |
|-------------------------|----------------------------------|---|---|
| <a href="#">JD-1700</a> | Both                             | Notice of permanency hearing  | Notice to all interested persons of the permanency hearing  |
| <a href="#">JD-1703</a> | Ch. 938                          | Request for custody by school attendance officer/designation by school district administrator | Request and order to take a truant juvenile into custody  |
| <a href="#">JD-1709</a> | Both                             | Juvenile court minutes  | Minutes of the events and outcome of juvenile court proceedings   |
| <a href="#">JD-1710</a> | Ch. 938                          | Temporary physical custody request (Ch. 938)  | Request for custody and custody decision by intake worker in a <a href="#">Wis. Stat.</a> ch. 938 proceeding                              |
| <a href="#">JD-1711</a> | Both                             | Order for temporary physical custody (secure/nonsecure)                                       | Court order directing custody ordered by the court for a child or juvenile  |
| <a href="#">JD-1712</a> | Both                             | Waiver of participation in nonsecure physical custody hearing                                 | Waiver by child/parent/guardian/legal custodian of participation in a nonsecure physical custody hearing to challenge or review placement |
| <a href="#">JD-1716</a> | Both                             | Notice of rights and obligations  | Notice to child and parents of basic rights and obligations and possibility of disclosure of personal information to victims              |

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|-------------------------|----------------------------------|---|--|
| <a href="#">JD-1717</a> | Both                             | Order to provide statement of income, assets, debts and living expenses             | Court order to parents to provide a statement of income, assets, debts, and living expenses; required when a child may be placed outside the home in a court proceeding or when otherwise appropriate  |
| <a href="#">JD-1718</a> | Both                             | Statement of income, assets, debts and living expenses                              | Statement to provide financial information to the court; used when a child may be placed outside the home in a court proceeding or when otherwise appropriate  |
| <a href="#">JD-1720</a> | Both                             | Summons   | Formal notice requiring a person to appear in court and to respond to a citation or petition   |
| <a href="#">JD-1721</a> | Ch. 938                          | Petition under Ch. 938—delinquency, protection or services, civil law or ordinances | Formal request to invoke the court's jurisdiction to adjudicate a juvenile as delinquent, JIPS, or for a civil law or ordinance violation  |
| <a href="#">JD-1722</a> | Ch. 938                          | Petition for waiver of jurisdiction   | Petition requesting the court to waive a juvenile from juvenile court into adult criminal court  |
| <a href="#">JD-1723</a> | Ch. 938                          | Order waiving juvenile court jurisdiction   | Formal decision on the request to waive a juvenile from juvenile court into adult criminal court   |
| <a href="#">JD-1724</a> | Both                             | Notice of hearing (juvenile)  | Notice informing individuals involved in a case of a scheduled court proceeding  |
| <a href="#">JD-1725</a> | Both                             | Notice to school board  | Notice to school board of the filing or dismissal of a felony delinquency petition; adjudication of delinquency; school attendance as condition of a CHIPS, JIPS, or delinquency dispositional order; and other information required to be provided the school board |
| <a href="#">JD-1729</a> | Both                             | Petition to vacate consent decree and waiver of hearing                             | Petition to vacate a consent decree and waive rights to a hearing  |
| <a href="#">JD-1730</a> | Both                             | Order on petition vacating consent decree and reinstating proceedings               | Order for termination of a consent decree and reinstatement of the proceedings   |
| <a href="#">JD-1731</a> | Both                             | Petition for examination or assessment  | Form for interested person to request the court to order a physical, psychological, mental, or developmental examination or AODA assessment of a child/juvenile/parent/guardian/legal custodian  |
| <a href="#">JD-1732</a> | Both                             | Order for examination or assessment   | Court findings and order directing that a physical, psychological, mental, or developmental examination or AODA assessment take place concerning a child/juvenile/parent/guardian/legal custodian  |
| <a href="#">JD-1733</a> | Ch. 938                          | Order concerning competency or mental responsibility determination                  | Court order concerning whether a juvenile is competent to proceed or not responsible by reason of mental disease or defect   |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|--------------------------|----------------------------------|---|--|
| <a href="#">JD-1734A</a> | Both                             | Consent of child/juvenile to medical services   | Child's or juvenile's consent for medical services   |
| <a href="#">JD-1734B</a> | Both                             | Medical authorization   | Court authorization for a child or juvenile's medical services   |
| <a href="#">JD-1735</a>  | Both                             | Plea questionnaire/waiver of rights (CHIPS and JIPS)  | Statement signed by child, juvenile, parent, guardian, legal custodian, or Indian custodian entering an admission or no contest plea in a CHIPS or JIPS case and indicating an understanding of the rights waived by such a plea |
| <a href="#">JD-1736</a>  | Both                             | Waiver of right to attorney (child/juvenile)  | Statement signed by a child or juvenile formally giving up the right to an attorney  |
| <a href="#">JD-1737</a>  | Ch. 938                          | Plea questionnaire/waiver of rights (delinquency)   | Statement signed by a juvenile entering a plea, waiving rights, and indicating an understanding of the rights waived by such a plea  |
| <a href="#">JD-1738A</a> | Both                             | Request to inspect juvenile court records   | Standardized form for requesting access to juvenile court records, as well as providing a record of the request  |
| <a href="#">JD-1738B</a> | Both                             | Order on request to inspect juvenile court records  | Court order to allow access to juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed  |
| <a href="#">JD-1739A</a> | Both                             | Request and authorization to open juvenile court records for inspection                           | Standardized form for authorization by certain parties to access child/juvenile court records, as well as providing a record of the request and a method for the juvenile clerk to indicate the records that were disclosed      |
| <a href="#">JD-1739B</a> | Both                             | Order on request to open juvenile court records for inspection                                    | Court order to open juvenile court records for inspection  |
| <a href="#">JD-1745</a>  | Ch. 938                          | Dispositional Order- (delinquent)   | Court order setting out the findings and dispositional conditions in a delinquency case  |
| <a href="#">JD-1745T</a> | Ch. 938                          | Dispositional order with termination of parental rights notice (delinquent)                       | Court order detailing the disposition in a delinquency case, with TPR notice   |
| <a href="#">JD-1746</a>  | Ch. 938                          | Dispositional order— protection or services (Ch. 938)   | Formal order setting out the findings and dispositional conditions in a JIPS case  |
| <a href="#">JD-1746T</a> | Ch.938                           | Dispositional order— protection or services— with termination of parental rights notice (Ch. 938) | Formal order of the court detailing the disposition in JIPS case, with TPR notice  |
| <a href="#">JD-1747</a>  | Ch. 938                          | Dispositional order—civil law/ordinance violation   | Formal order setting out the findings and detailing the disposition in a civil law or ordinance case   |
| <a href="#">JD-1748</a>  | Both                             | Order dismissing petition   | Formal order dismissing petition in juvenile court   |



| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>  |
|--------------------------|----------------------------------|--|---|
| <a href="#">JD-1749</a>  | Ch. 938                          | Acknowledgment of dispositional conditions and sanctions (delinquency/JIPS)                          | Statement signed by juvenile indicating an understanding of the dispositional conditions, the possible sanctions for a violation, and the case worker's ability to take the juvenile into custody for 72 hours while investigating a possible violation   |
| <a href="#">JD-1750A</a> | Ch. 938                          | Request to impose stayed delinquency dispositional order   | Form to allow juvenile to waive the right to a hearing when the supervising agency is asking to have the court lift a stay of a dispositional order   |
| <a href="#">JD-1750B</a> | Ch. 938                          | Order to impose stayed delinquency dispositional order   | Court's order to grant or deny request to impose stayed dispositional order   |
| <a href="#">JD-1751</a>  | Ch. 938                          | Teen court referral  | Court order referring a juvenile to a teen court program  |
| <a href="#">JD-1752</a>  | Both                             | Notice of right to seek postdisposition relief (CHIPS and JIPS)                                      | Notice to parent of time limits for postdisposition relief  |
| <a href="#">JD-1753</a>  | Both                             | Notice concerning grounds to terminate parental rights   | Notice to a parent or expectant mother of the possible grounds for termination of parental rights when a child or expectant mother or juvenile is placed outside the home or a parent is denied visitation rights   |
| <a href="#">JD-1754</a>  | Both                             | Notice of change in placement (out-of-home to out-of-home/out-of-home to in-home/in-home to in-home) | Notice to interested persons that a change in placement has taken or will take place  |
| <a href="#">JD-1755</a>  | Ch. 938                          | Notice to school district to transfer records  | Notice to the school district of the responsibility to transfer school records to a state institution or a secured residential care center for children and youth   |
| <a href="#">JD-1756</a>  | Ch. 938                          | Acknowledgment of dispositional conditions and sanctions (habitual truancy)                          | Statement signed by a juvenile indicating an understanding of the sanctions available to the court for a violation of a dispositional order pertaining to habitual truancy and the authority of the social worker to order a 72-hour hold on the juvenile while an alleged violation of a dispositional order is being investigated |
| <a href="#">JD-1757</a>  | Ch. 938                          | Notice of right to seek postdisposition relief   | Notice to inform juvenile after disposition of the right to seek postdisposition relief, and to document that the juvenile's lawyer has counseled the defendant about seeking postdisposition relief  |
| <a href="#">JD-1758</a>  | Ch. 938                          | Notice of intent to enter civil judgment for restitution, forfeiture, or surcharge                   | Notice to the juvenile and the parent of the intent of the court to issue an order for judgment for unpaid restitution, forfeiture, or surcharge amounts  |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|--------------------------|----------------------------------|---|--|
| <a href="#">JD-1759</a>  | Ch. 938                          | Petition for judgment against juvenile/parent for unpaid restitution  | Request by victim, insurer, or representative of the public interest to have a restitution order converted into a money judgment that can be docketed against the juvenile and parents                               |
| <a href="#">JD-1760</a>  | Ch. 938                          | Petition for judgment against juvenile/parent for unpaid forfeiture/surcharge   | Request by state, county, or municipality to have an unpaid forfeiture or surcharge converted into a money judgment that can be docketed against the juvenile and parent(s)  |
| <a href="#">JD-1761</a>  | Ch. 938                          | Judgment for unpaid restitution/forfeiture/surcharge  | Court order granting a judgment against juvenile or parent with custody for unpaid restitution, forfeiture, or surcharge   |
| <a href="#">JD-1762</a>  | Both                             | Order for recoupment of costs of legal services   | Court order directing the parents to reimburse state for costs of legal services provided to child/juvenile by publicly paid attorney  |
| <a href="#">JD-1763A</a> | Both                             | Public Defender response concerning recoupment  | State Public Defender's response to the court concerning a parent's request for an indigency determination   |
| <a href="#">JD-1763B</a> | Both                             | Order concerning recoupment   | Court order concerning a parental request for an indigency determination   |
| <a href="#">JD-1765</a>  | Both                             | Order granting temporary extension  | Order by court granting a request for a temporary extension of an unexpired dispositional order until a hearing can be held on a petition to extend  |
| <a href="#">JD-1766</a>  | Both                             | Request to change placement/revise dispositional order  | Request to change placement of the child/juvenile or revise the dispositional order  |
| <a href="#">JD-1767</a>  | Both                             | Notice of postdisposition emergency change in placement and hearing request (in-home to out-of-home)                    | Notice to child, parent, and other interested parties of emergency change in placement and request for hearing in postdispositional case under <a href="#">Wis. Stat.</a> ch. 48 or 938                              |
| <a href="#">JD-1768T</a> | Both                             | Postdisposition emergency change in placement order with termination of parental rights notice (in-home to out-of-home) | Court order for emergency change from in-home to out-of-home placement in postdispositional case under <a href="#">Wis. Stat.</a> ch. 48 or 938, with TPR notice   |
| <a href="#">JD-1770</a>  | Ch. 938                          | Short term detention—pending investigation/as a consequence/crisis intervention   | Document authorizing custody hold of juvenile pending investigation of an alleged violation of a dispositional order, as a consequence for violation of a dispositional order, or if crisis intervention is required |
| <a href="#">JD-1771</a>  | Ch. 938                          | Petition for removal of firearm restriction (juvenile)  | Petition to allow an individual who has been adjudicated delinquent for a felony to ask a court to remove firearms restrictions  |
| <a href="#">JD-1772</a>  | Ch. 938                          | Order concerning removal of firearm restriction (juvenile)  | Court order granting or denying a petition of an individual who has been adjudicated delinquent to remove firearms restrictions  |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>  |
|--------------------------|----------------------------------|--|---|
| <a href="#">JD-1773</a>  | Ch. 938                          | Motion for sanctions   | Motion by the district attorney, corporation counsel, agency representative, or circuit/municipal court to impose sanctions on a juvenile for a violation of a dispositional order                                  |
| <a href="#">JD-1774</a>  | Ch. 938                          | Order for sanctions  | Court order imposing sanctions for a violation of a dispositional order   |
| <a href="#">JD-1775</a>  | Both                             | Order terminating consent decree/dispositional order                                     | Court order terminating the consent decree or dispositional order   |
| <a href="#">JD-1780</a>  | Ch. 938                          | Petition to expunge court record of adjudication/<br>Recommendation of district attorney | Request by juvenile after age 17 to have the juvenile court record expunged; recommendation by district attorney supporting or objecting to juvenile's request  |
| <a href="#">JD-1781</a>  | Ch. 938                          | Order concerning petition to expunge court record of adjudication                        | Order by court granting or denying a request to expunge court record of juvenile's adjudication of delinquency and, if granted, directing the juvenile clerk to expunge the record                                  |
| <a href="#">JD-1782</a>  | Both                             | Order for payment of guardian ad litem fees and expenses for child/juvenile              | Order for payment or reimbursement of guardian ad litem and expert witness fees and expenses for a child or juvenile under <a href="#">Wis. Stat.</a> chs. 48 and 938   |
| <a href="#">JD-1783A</a> | Both                             | Stipulation to revise dispositional order  | Stipulation to revise dispositional order   |
| <a href="#">JD-1783B</a> | Both                             | Order on stipulation to revise dispositional order                                       | Final order approving stipulation to revise a dispositional order   |
| <a href="#">JD-1784A</a> | Both                             | Stipulation for consent decree (in-home placement only)                                  | Agreement between parties requiring certain actions or activities to be done in exchange for suspending formal proceedings  |
| <a href="#">JD-1784B</a> | Both                             | Consent decree (in-home placement only)  | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings; court official approves the consent decree and orders the parties to comply with it |
| <a href="#">JD-1785A</a> | Both                             | Stipulation for consent decree (out-of-home placement only)                              | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings  |
| <a href="#">JD-1785B</a> | Both                             | Consent decree (out-of-home placement only)  | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings; court official approves the consent decree and orders the parties to comply with it |
| <a href="#">JD-1786</a>  | Both                             | Order for revision of dispositional order  | Order granting or denying request for revision of dispositional order   |
| <a href="#">JD-1786T</a> | Both                             | Order for revision of dispositional order with termination of parental rights notice     | Order to revise dispositional order with notice concerning grounds for TPR  |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>   |
|--------------------------|----------------------------------|--|--|
| <a href="#">JD-1787</a>  | Both                             | Order for extension of dispositional order or consent decree (in-home placement only)  | Order granting or denying request for extension of a dispositional order or consent decree for in-home placement only                                    |
| <a href="#">JD-1788</a>  | Both                             | Order for extension of dispositional order or consent decree (out-of-home placement only)  | Order granting or denying request for extension of a dispositional order or consent decree for correctional and certain out-of-home-placements           |
| <a href="#">JD-1788T</a> | Both                             | Order for extension of dispositional order or consent decree with termination of parental rights notice (out-of-home placement only) | Court order extending a dispositional order or consent decree for correctional and certain out-of-home placements with notice concerning grounds for TPR |
| <a href="#">JD-1789T</a> | Both                             | Order for change in placement with termination of parental rights notice (in-home to out-of-home placement only)                     | Order to change placement from the juvenile's or child's home to an out-of-home placement with notice concerning grounds for TPR                         |
| <a href="#">JD-1790T</a> | Both                             | Order for change in placement with termination of parental rights notice (out-of-home to out-of-home placement only)                 | Order to change placement from one out-of-home to another out-of-home placement with notice concerning grounds for TPR                                   |
| <a href="#">JD-1791</a>  | Both                             | Permanency hearing order   | Order to approve, disapprove, or revise the permanency plan  |
| <a href="#">JD-1791T</a> | Both                             | Permanency hearing order with termination of parental rights warnings  | Order to approve, disapprove, or revise the permanency plan with notice concerning grounds for TPR   |
| <a href="#">JD-1792</a>  | Both                             | Order for change in placement (out-of-home to in-home placement only)  | Order to change placement from out-of-home to in-home placement  |
| <a href="#">JD-1793</a>  | Both                             | Order for change in placement (in-home to in-home placement only)  | Court order for change of placement from in-home to in-home placement  |
| <a href="#">JD-1798A</a> | Both                             | Order appointing guardian ad litem or attorney (Chs. 48 and 938)   | Order to appoint either attorney or guardian ad litem for an individual in a <a href="#">Wis. Stat.</a> ch. 48 or 938 proceeding                         |
| <a href="#">JD-1798B</a> | Both                             | Consent to act as guardian ad litem or attorney (Chs. 48 and 938)  | Consent to act as guardian ad litem or attorney for an individual in a <a href="#">Wis. Stat.</a> ch. 48 or 938 proceeding                               |
| <a href="#">JD-1799</a>  | Both                             | Statement of guardian ad litem (Chs. 48 and 938)   | Written statement by guardian ad litem regarding the completion of duties required in CHIPS and JIPS cases   |
| <a href="#">JD-1800</a>  | Both                             | Request to extend consent decree   | Notice to all interested persons of request for extension of consent decree  |
| <a href="#">JD-1801</a>  | Both                             | Notice and request for trial reunification, extension of trial reunification, or revocation of trial reunification                   | Notice and request by caseworker for trial reunification, extension, or revocation   |
| <a href="#">JD-1802</a>  | Both                             | Order for trial reunification  | Court order granting or denying request for trial reunification  |

| <b>Form Number</b>      | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>  | <b>Purpose</b>  |
|-------------------------|----------------------------------|--|---|
| <a href="#">JD-1803</a> | Both                             | Order for extension of trial reunification                                 | Court order granting or denying request for extension of trial reunification  |
| <a href="#">JD-1804</a> | Both                             | Order for revocation of trial reunification                                | Court order granting or denying request for revocation of trial reunification   |
| <a href="#">JD-1805</a> | Both                             | Order granting temporary extension of trial reunification                  | Court order for temporary extension of trial reunification  |
| <a href="#">JD-1806</a> | Both                             | Request for transition to discharge hearing                                | Request that the court hold a transition to discharge hearing before the termination date of an order for out-of-home care  |
| <a href="#">JD-1810</a> | Both                             | Petition for voluntary transition to independent living agreement          | Request for voluntary transition to independent living agreement and notice of hearing  |
| <a href="#">JD-1811</a> | Both                             | Order on petition for voluntary transition to independent living agreement | Order granting or denying petition for voluntary transition to independent living agreement   |
| <a href="#">JD-1814</a> | Both                             | Request for case closure order   | Request for case closure order in postdispositional case under <a href="#">Wis. Stat.</a> ch. 48 or 938 when child or juvenile is or will be placed with a parent and entry of an original family court order or modification of an existing family court order with regard to paternity, legal custody, physical placement, visitation, child support, or payment of health-care expenses                    |
| <a href="#">JD-1815</a> | Both                             | Case closure order   | Order denying or granting request to terminate dispositional order in a juvenile court case under <a href="#">Wis. Stat.</a> ch. 48 or 938 when the child or juvenile is placed with a parent and to enter an original family court order or modify an existing family court order with regard to paternity, legal custody, physical placement, visitation, child support, or payment of health-care expenses |
| <a href="#">JD-1820</a> | Both                             | Confidential foster parent information                                     | Document to keep foster parent information confidential   |
| <a href="#">JD-1825</a> | Both                             | Affidavit of service (Ch. 48 and 938)                                      | Affidavit of service  |
| <a href="#">JD-1826</a> | Both                             | Request for qualified residential treatment program placement findings     | Request for court to make required findings concerning placement or proposed placement of child or juvenile in qualified residential treatment program  |
| <a href="#">JD-1827</a> | Both                             | Findings and order for qualified residential treatment program placement   | Record of court findings concerning placement or proposed placement of child or juvenile in qualified residential treatment program and order approving or disapproving the placement   |

**Juvenile Court Forms—Indian Child Welfare Act (ICWA)  
Wisconsin Records Management Committee**

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>  |
|--------------------------|----------------------------------|---|---|
| <a href="#">IW-1608</a>  | Ch. 48                           | Temporary physical custody request (Ch. 48)—Indian Child Welfare Act  | Form to request that a child or expectant mother be taken into temporary physical custody in a <a href="#">Wis. Stat.</a> ch. 48 proceeding and to record the juvenile intake worker's decision concerning custody. |
| <a href="#">IW-1609</a>  | Both                             | Statement of active efforts—Indian Child Welfare Act  | Statement used to provide information for the court to determine whether active efforts were made to prevent the breakup of the Indian family in cases subject to the Wisconsin Indian Child Welfare Act (WICWA)    |
| <a href="#">IW-1610</a>  | Ch. 48                           | Petition for protection or services (Ch. 48)—Indian Child Welfare Act   | Formal request to invoke the court's jurisdiction to adjudicate an Indian child in need of protection or services under <a href="#">Wis. Stat.</a> ch. 48   |
| <a href="#">IW-1611T</a> | Ch. 48                           | Dispositional order—protection or services with termination of parental rights notice (Ch. 48)—Indian Child Welfare Act | Court order detailing the disposition in a CHIPS case involving a child subject to ICWA, with TPR notice  |
| <a href="#">IW-1630</a>  | Ch. 48                           | Petition for termination of parental rights—Indian Child Welfare Act  | Petition to initiate a proceeding to terminate the parental rights of a parent to a child subject to ICWA   |
| <a href="#">IW-1633</a>  | Ch. 48                           | Summons (termination of parental rights)—Indian Child Welfare Act   | Notice to parents that a petition to terminate parental rights has been filed and that parents must appear in court for a hearing, in a case involving a child subject to ICWA                                      |
| <a href="#">IW-1637</a>  | Ch. 48                           | Consent to termination of parental rights (judicial)—Indian Child Welfare Act   | Consent form signed by a parent before a judicial officer, consenting to the termination of his or her parental rights to a child who is subject to ICWA  |
| <a href="#">IW-1638</a>  | Ch. 48                           | Order concerning termination of parental rights (voluntary)—Indian Child Welfare Act                                    | Order formally indicating the court's decision on a petition to voluntarily terminate the parental rights of a parent to a child who is subject to ICWA   |
| <a href="#">IW-1639</a>  | Ch. 48                           | Order concerning termination of parental rights (involuntary)—Indian Child Welfare Act                                  | Order formally indicating the court's decision on a petition to terminate the parental rights of a parent to a child who is subject to ICWA   |
| <a href="#">IW-1647</a>  | Ch. 48                           | Order on petition for minor child adoption—Indian Child Welfare Act   | Order formally indicating the court's decision on a petition for minor child adoption   |
| <a href="#">IW-1649</a>  | Ch. 48                           | Indian child adoptee information—Indian Child Welfare Act   | Form for recording information about minor Indian child adoptee   |
| <a href="#">IW-1700</a>  | Both                             | Notice of permanency hearing (ICWA)   | Notice to all interested persons of the permanency hearing in an ICWA case  |
| <a href="#">IW-1711</a>  | Both                             | Order for temporary physical custody—secure/nonsecure—Indian Child Welfare Act  | Court order directing custody ordered by the court in out-of-home placement for a child/juvenile who is subject to ICWA   |



| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|--------------------------|----------------------------------|---|--|
| <a href="#">IW-1716</a>  | Both                             | Notice of rights and obligations—Indian Child Welfare Act   | Written notice to be provided to child/juvenile and parents of their basic rights and obligations as well as the possibility of disclosure of personal information to victims in a case involving ICWA     |
| <a href="#">IW-1720</a>  | Both                             | Summons—Indian Child Welfare Act  | Formal notice requiring a person to appear in court and respond to a citation or petition when the case involves a child/juvenile who is subject to ICWA   |
| <a href="#">IW-1721</a>  | Ch. 938                          | Petition for protection or services (Ch. 938)—Indian Child Welfare Act  | Formal request to invoke the court's jurisdiction to adjudicate an Indian juvenile in need of protection or services under <a href="#">Wis. Stat.</a> § 938.13(4), (6), (6m), or (7)                       |
| <a href="#">IW-1724</a>  | Both                             | Notice of hearing (juvenile)—Indian Child Welfare Act   | Notice informing interested persons of the scheduling of court proceedings in a case involving a child/juvenile who is subject to ICWA   |
| <a href="#">IW-1740</a>  | Both                             | Motion for transfer to tribal court   | Motion to transfer a proceeding involving an out-of-home placement of, or termination of parental rights to, an Indian child/juvenile from a circuit court to a tribal court                               |
| <a href="#">IW-1741</a>  | Both                             | Order on motion for transfer to tribal court—Indian Child Welfare Act   | Court order to transfer (or deny transfer of) a proceeding involving an out-of-home placement of or termination of parental rights to an Indian child/juvenile from a circuit court to a tribal court      |
| <a href="#">IW-1746T</a> | Ch. 938                          | Dispositional order—protection or services with termination of parental rights notice (Ch. 938) Indian Child Welfare Act      | Court order setting out the findings and dispositional conditions in a JIPS case under <a href="#">Wis. Stat.</a> § 938.13(4), (6), (6m), or (7), involving a juvenile subject to ICWA, with notice of TPR |
| <a href="#">IW-1754</a>  | Both                             | Notice of change in placement (out-of-home to out-of-home/out-of-home to in-home/in-home to in-home)—Indian Child Welfare Act | Notice advising interested parties that change in placement has taken or will take place, in a case involving a child/juvenile subject to ICWA   |
| <a href="#">IW-1766</a>  | Both                             | Request to change placement/revise dispositional order—Indian Child Welfare Act   | Request to change placement of the child/juvenile or revise the dispositional order, in case involving child/juvenile subject to ICWA  |
| <a href="#">IW-1783A</a> | Ch. 48                           | Consent to delegation of powers under § 48.979 of an Indian child   | Form signed by parent of an Indian child to consent to delegation of parental powers under <a href="#">Wis. Stat.</a> § 48.979   |
| <a href="#">IW-1783B</a> | Ch. 48                           | Certificate to delegation of powers under § 48.979 of an Indian child   | Form signed by the court to certify delegation of parental powers under <a href="#">Wis. Stat.</a> § 48.979 in case involving an Indian child  |

| <b>Form Number</b>       | <b>Ch. 48, Ch. 938, or Both?</b> | <b>Name of Form</b>   | <b>Purpose</b>   |
|--------------------------|----------------------------------|---|--|
| <a href="#">IW-1785A</a> | Both                             | Stipulation for consent decree (out-of-home placement only)—Indian Child Welfare Act  | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings involving child/juvenile subject to ICWA  |
| <a href="#">IW-1785B</a> | Both                             | Consent decree (out-of-home placement only)—Indian Child Welfare Act  | Agreement between the parties requiring certain actions or activities to be done in exchange for suspending formal proceedings (in case involving out-of-home placement for child/juvenile subject to ICWA); court official approves the consent decree and orders the parties to comply with it |
| <a href="#">IW-1788</a>  | Both                             | Order for extension of dispositional order or consent decree (out-of-home placement only)—Indian Child Welfare Act  | Order granting or denying request for extension of a dispositional order or consent decree for correctional and certain out-of-home placements involving child/juvenile subject to ICWA  |
| <a href="#">IW-1788T</a> | Both                             | Order for extension of dispositional order or consent decree with termination of parental rights notice (out-of-home placement only)—Indian Child Welfare Act | Order of the court extending a dispositional order or consent decree for correctional and out-of-home placements, with notice of TPR   |
| <a href="#">IW-1789T</a> | Both                             | Order for change in placement with termination of parental rights notice (in-home to out-of-home placement only)—Indian Child Welfare Act                     | Order to change placement from the child/juvenile's home to an out-of-home placement in case involving child/juvenile subject to ICWA, with notice of TPR  |
| <a href="#">IW-1790T</a> | Both                             | Order for change in placement with termination of parental rights notice (out-of-home to out-of-home placement only)—Indian Child Welfare Act                 | Order to change placement from one out-of-home to another out-of-home placement in case involving child/juvenile subject to ICWA, with notice of TPR   |
| <a href="#">IW-1791</a>  | Both                             | Permanency hearing order —Indian Child Welfare Act  | Order to approve, disapprove, or revise the permanency plan of child/juvenile subject to ICWA  |
| <a href="#">IW-1791T</a> | Both                             | Permanency hearing order with termination of parental rights notice—Indian Child Welfare Act  | Order to approve, disapprove, or revise the permanency plan of child/juvenile subject to ICWA, with notice of TPR  |

## Forms Index

References are to sections, not pages.  
**Boldface indicates the actual title of a form.**

**AB**

Alternative Disposition, Motion for, 11.58  
 Alternative Placement Pending Adjudication, Motion for, 5.55  
 Amendment of Detention Order, Notice and Motion for, 5.50  
 Amendment of Detention Order, Order for, 5.51  
 Amendment of Petition, Notice of, 7.31  
 Appeal Nonfinal Order, Petition for Leave to, 13.17

**C**

Change of Venue, Motion for, 4.46  
 Circuit Court Commissioner, Motion to Review Decision of, 5.53  
 Continuance, Motion for, 11.61  
 Custody, Motion to Release for Failure to Comply with [Wis. Stat.](#) § 938.205, 5.59  
 Custody, Motion to Release for Failure to Comply with [Wis. Stat.](#) § 938.21, 5.58

**DEFG**

Decision of Circuit Court Commissioner, Motion to Review, 5.53  
**Defendant's Response to State's Discovery Demand, 9.57**  
 Delivery of Law Enforcement Officers' Reports, Order for, 9.54  
 Demand (for Discovery), Defendant's Response to State's Demand, 9.57  
**Demand for Discovery and Inspection, 9.55**  
 Detention Hearing, Request for New, 5.52  
 Detention Order, Notice and Motion for Amendment of, 5.50  
 Detention Order, Order for Amendment of, 5.51  
 Detention Order, Request for Revision of, 5.52  
 Detention (Secure), Motion for Release from, 5.54  
 Discovery and Inspection, Demand for, 9.55  
 Discovery, Defendant's Response to State's Demand, 9.57  
 Discovery, Motion for, 9.56  
 Dismiss Defective Waiver Petition, Motion to, 14.30  
 Dismiss, Motion to, 7.27  
 Dismiss Petition for Failure to Comply with Statutory Time Periods, Motion to, 7.29  
 Dismiss Petition, Motion to, 7.27  
 Disposition, Motion for Alternative, 11.58  
 Dispositional Order, Notice and Motion to Review, 11.59  
 Dispositional Study, Motion for Further, 11.57

**H**

Hearing (Detention), Request for New, 5.52  
 Hearing, Petition for New, 11.60

**I**

Identification, Motion to Suppress, 9.64  
 Inspection of Records, Release and Motion for, 9.59  
 Inspection or Delivery of Records, Letter to Request, 9.58

**JKL**

Judge, Request for Substitution of, 8.47  
 Law Enforcement Officers' Reports, Order for Delivery of, 9.54

**Letter to Request Inspection or Delivery of Records, 9.58****M**

Motion (and Notice) to Review Dispositional Order, 11.59

**Motion for Alternative Disposition, 11.58**

**Motion for Change of Venue, 4.46**

**Motion for Continuance, 11.61**

**Motion for Delivery of Law Enforcement Officers' Reports, 9.53**

**Motion for Discovery, 9.56**

**Motion for Further Dispositional Study, 11.57**

Motion for Inspection of Records, 9.59

**Motion for Protection of Records, 9.61**

**Motion for Release from Secure Custody and for Alternative Placement Pending Adjudication, 5.55**

**Motion for Release from Secure Detention, 5.54**

**Motion for Severance of Juvenile Defendants, 9.65**

**Motion to Dismiss Defective Waiver Petition, 14.30**

**Motion to Dismiss or, in the Alternative, to Remand Proceeding to Intake Stage, 7.28**

**Motion to Dismiss Petition, 7.27**

**Motion to Dismiss Petition for Failure to Comply with Statutory Time Periods, 7.29**

**Motion to Release from Custody for Failure to Comply with [Wis. Stat.](#) § 938.205, 5.59**

**Motion to Release from Custody for Failure to Comply with [Wis. Stat.](#) § 938.21, 5.58**

**Motion to Review Decision of Circuit Court Commissioner, 5.53**

**Motion to Sever Charges, 9.66**

**Motion to Strike or, in the Alternative, to Make Petition More Specific, 7.30**

**Motion to Suppress, 9.67**

**Motion to Suppress Identification, 9.64**

**Motion to Suppress Physical Evidence, 9.62**

**Motion to Suppress Statements, 9.63**

**N**

Nonfinal Order, Petition for Leave to Appeal, 13.17

**Notice and Motion to Review Dispositional Order, 11.59**

**Notice, Motion for Amendment of Detention Order, 5.50**

**Notice of Amendment of Petition, 7.31**

**Notice of Intent to Pursue Postdispositional Relief, 12.38**

**O**

Order (Detention), Order for Amendment of, 5.51

Order (Detention), Request for Revision of, 5.52

Order (Dispositional), Notice and Motion to Review, 11.59

**Order for Amendment of Detention Order, 5.51**

**Order for Delivery of Law Enforcement Officers' Reports, 9.54**

**Order for Inspection of Records, 9.60**

Order for Temporary Release, 5.57

Order (Nonfinal), Petition for Leave to Appeal, 13.17

**PQ**

Petition, Motion to Dismiss, 7.27

Petition, Motion to Dismiss for Failure to Comply with Statutory Time Periods, 7.29

Petition, Motion to Make More Specific, 7.30

Petition, Notice of Amendment of, 7.31

**Petition for Leave to Appeal Nonfinal Order, 13.17**

**Petition for New Hearing, 11.60****Petition for Writ of Habeas Corpus, 5.56**

Petition (Waiver), Motion to Dismiss, 14.30

Physical Evidence, Motion to Suppress, 9.62

Placement Pending Adjudication, Motion for Alternative, 5.55

Postdispositional Relief, Notice of Intent to Pursue, 12.38

**R**

Records, Motion for Protection of, 9.61

Records, Order for Inspection of, 9.60

Records, Release and Motion for Inspection of, 9.59

Release from Custody for Failure to Comply with [Wis. Stat.](#) § 938.205, Motion to, 5.59Release from Custody for Failure to Comply with [Wis. Stat.](#) § 938.21, Motion to, 5.58

Release from Secure Custody, Motion for, 5.55

Release from Secure Detention, Motion for, 5.54

**Release and Motion for Inspection of Records, 9.59**

Release (Temporary), Order for, 5.57

Remand Proceeding to Intake Stage, Motion to, 7.28

Reports (Law Enforcement Officers'), Motion for Delivery of, 9.53

Reports (Law Enforcement Officers'), Order for Delivery of, 9.54

**Request for New Detention Hearing and for Revision of Detention Order, 5.52****Request for Substitution of Judge, 8.47**

Response (of Defendant) to State's Discovery Demand, 9.57

Review Decision of Circuit Court Commissioner, Motion to, 5.53

Revision of Detention Order, Request for, 5.52

**S**

Secure Custody, Motion for Release from, 5.55

Secure Detention, Motion for Release from, 5.54

Sever Charges, Motion to, 9.66

Severance of Juvenile Defendants, Motion for, 9.65

Statements, Motion to Suppress, 9.63

Strike, Motion to, 7.30

Substitution of Judge, Request for, 8.47

Suppress Identification, Motion to, 9.64

Suppress, Motion to, 9.67

Suppress Physical Evidence, Motion to, 9.62

Suppress Statements, Motion to, 9.63

**TU**

Temporary Release, Order for, 5.57

Time Periods (Statutory), Motion to Dismiss Petition for Failure to Comply with, 7.29

**V**

Venue, Motion for Change of, 4.46

**WXYZ**

Waiver Petition, Motion to Dismiss, 14.30

Writ of Habeas Corpus, 5.57

**Writ of Habeas Corpus and Order for Temporary Release, 5.57**

Writ of Habeas Corpus, Petition for, 5.56

---

# Subject Index

---

References are to sections and chapters, not pages.

## A

### Abandonment

Termination of parental rights, ground for, 17.16  
 UCCJEA, ground for temporary emergency jurisdiction under, 19.6

### Abortion

*See also* Unborn Child  
 Medical-emergency exception, 18.14  
 Restricted access issues, 4.30, 18.1, 18.2, 18.14, 18.19  
 Waiver of parental consent, generally, 18.1–.2  
 —appeal, 18.7, 18.15–.18  
 —appearance, initial, 18.8  
 —clergy’s role, 18.6, 18.9–.12, 18.16  
 —confidentiality, 18.6  
 —consent requirement and exceptions, 18.4  
 —counsel, right to, 18.7  
 —emancipated minor, 18.4  
 —evidence, 18.9  
 —fees and costs, 18.13  
 —guardian ad litem, 18.8–.9  
 —hearing, 18.9  
 —judge selection, 18.6, 18.12  
 —jurisdiction, 4.30  
 —order, 18.11  
 —persons barred from proceedings, 18.8, 18.18  
 —petition, 18.6  
 —physician’s role, 18.4  
 —procedure, 18.6–.11  
 —standards, 18.10  
 —time periods, 18.8–.12  
 —ultrasound, 18.4

### Abuse

*See* Child Abuse

### Admissions

Determination of voluntariness, 8.44, 17.42  
 Termination of parental rights, 17.42

### Adoption

Jurisdiction, 4.32  
 Termination of parental rights, 17.59–.60

### Adult Court

*See also* Waiver into Adult Court  
 Access to juvenile court records, 15.44  
 Jurisdiction, exclusive original, 4.17  
 Penalties, 4.19

### Adults



Jurisdiction, 4.31

Relatives

—identification of, as possible placements, 12.9, 12.18

—notice of child relative's removal from home, 5.38, 12.19

### **Aftercare**

*See* Community Supervision

### **Age**

CHIPS jurisdiction, 4.25

Chapter 938 jurisdiction, 4.43

Civil law and ordinance violation jurisdiction, 4.27

Delinquency jurisdiction, 4.4–.10

Exclusive original adult court jurisdiction, 4.17

JIPS jurisdiction, 4.24

Traffic, boating, snowmobile, ATV, and limited-use off-highway motorcycle offense jurisdiction, 4.28

Waiver criteria, 14.23

### **Agencies**

Access to school records, 15.45

Defined, 15.20

Diversion to, 6.14

Reasonable effort to provide services, 17.18

Records, confidentiality of, 15.20–.26

Role, generally, 3.18

### **Aggravated Circumstances**

Defined, 5.38, 7.18, 8.7, 10.13, 11.10, 12.9

### **Alcoholism**

Assessment and treatment, 6.15, 8.28

Finding of need for treatment and education, 10.18

Multidisciplinary screen, 6.5

Treatment or education, 11.37, 11.52, 11.53

### **Alibi, Notice of, 9.29**

### **Appeal, ch. 13**

Of final order, 13.12

Interlocutory, 13.3–.11

—briefs, 13.7

—petition, 13.4–.5, 13.9

—procedure, 13.4

—response to petition for leave, 13.6

—standard of review, 13.11

Notice of, 13.12

Notice of intent to pursue postdispositional relief, 13.12

Remand, termination-of-parental-rights case, 13.13

Stay pending, 13.14

Termination of parental rights, 13.13, 17.60

Waiver into adult court, 13.2, 13.9–.11

Waiver of parental consent for abortion, 18.7, 18.15–.18

### **Appearances**

*See also* Summons

Dispositional hearing, 11.5

Fact-finding hearing, 10.4–.9

Plea hearing, 8.3, 8.4

Termination of parental rights, fact-finding hearing, 17.44

Waiver of parental consent for abortion, 18.8

**Arrest**

Physical custody as, 5.48

**Attorney**

*See* Counsel; Defense Counsel; Guardian ad Litem; Prosecutor

**B****Boating Violation**

Jurisdiction, 4.28

**Brady Rule**, 9.9, 9.21

**Burden of Proof**, 2.27–.32

CHIPS, 2.29, 11.7

Delinquency, 2.28

Dispositional hearing, 2.31, 11.7

Extension hearing, 2.31

JIPS, 2.29

Postdispositional hearing, 12.2

Sanction hearing, 2.31, 16.8

Termination of parental rights, 2.29, 17.12, 17.56. *See also* Indian Child Welfare Act

UCHIPS, 2.29

Waiver hearing, 2.32, 14.11, 14.17

**C****CASA**

*See* Court-Appointed Special Advocate

**CHIPS**

*See* Children in Need of Protection or Services

**Capias**

Dispositional hearing, 11.5

Fact-finding hearing, 10.4

Physical custody, 5.7

Plea hearing, 8.3

**Care and Treatment Plan**, 11.24

**Caregivers**

Background checks, confidentiality of records, 15.41

Reasonable-and-prudent-parent standard, 11.14, 12.30

**Certiorari, Writ of**, 12.13–.14

**Change in Placement**

*See* Placement

**Chapter 51**

Child or expectant mother taken into custody, 5.11

Counsel, right to, 2.9

Disclosure under, 15.24

Jurisdiction, 4.29

**Chapter 55**

Counsel, right to, 2.9  
Jurisdiction, 4.29

## **Charges**

*See* Petition

## **Child**

*See also* Runaway Child

Abandonment, 17.16

Access to records, 15.13, 15.21, 15.29

Defined, 4.25, 19.1

Exclusion from hearing, 8.4, 10.8, 15.3, 17.44. *See also* Victim, Rights Under Marsy's Law

Interview by intake worker, 3.14

Unavailability, 10.12, 11.6

Use of term, ch. 1

## **Child Abuse**

Abuse, defined, 4.25

Investigation time period, 6.4

Termination of parental rights, 17.21

UCCJEA, ground for temporary emergency jurisdiction under, 19.6

## **Child Welfare Agencies**

*See* Agencies

## **Children in Need of Protection or Services (CHIPS)**

Admission, voluntariness of, 8.44

Burden of proof, 2.29, 11.7

Consent decree, 8.38–39. *See also* Consent Decree

Continuing need, 17.18

Counsel

—pilot program, ch. 1, 2.14, 3.2

—right to, 2.6, 2.14, 3.2, 3.7

—waiver of, 2.6

Detention hearing procedure, 5.27–31

Discovery, 9.5–7, 9.37–39

Disposition, 11.2, 11.51. *See also* Disposition

Duty to warn, 11.53, 12.35

Exclusion of child from hearings, 8.4, 10.8, 15.3. *See also* Victim, Rights Under Marsy's Law

Fact-finding hearing. *See* Fact-Finding Hearing

Findings of fact, 10.18

Grounds, 4.25, 10.17

Guardian ad litem's role, 3.7

Jurisdiction, 4.25

Jury instructions, 10.15

Jury selection, 10.15

Jury trial right, 2.19, 8.13

Petition. *See* Petition

Plea bargaining, 8.20. *See also* Plea Bargaining

Plea hearing. *See* Plea Hearing

Prosecutor's role, 3.4

Self-incrimination, 2.24, 9.39

Summary judgment, 10.19

Venue, 4.37

Witnesses

—confrontation, 2.25

—presentation and subpoena, 2.25

## **Civil Law Violation**

Jurisdiction, 4.27

Venue, 4.36

**Closing the Case**

Case closure order, 4.33, 11.22

Intake inquiry, 6.9, 6.30

**Communications**

Intercepted, 9.17

**Community Service Work**

Consent decree, 8.30, 8.33

Deferred prosecution agreement, 6.17

Drug offense, 11.27

Sanction for noncompliance with dispositional order, 11.47, 16.3

**Community Supervision**

Extensions of, 12.17, 12.29, 12.34

Release to, 11.41, 12.12, 12.15

Replacing aftercare, 12.1

Revocation of, 12.16

**Competency of Court to Proceed, 7.11, 7.14, 8.7, 10.11, 11.6, 12.24****Competency of Individual, 9.50, 17.62****Computer Crimes, 11.46****Conclusions of Law, 10.18****Confession**

*See* Statements

**Confidential Informers**

Discovery, 9.6

**Confidentiality, ch. 15**

Generally, 15.1

Appeals, 13.7, 13.13

Hearings, 15.2–.8

Records, 15.9–.46

—generally, 15.10

—agency records, 15.20–.26

—court records, 15.28–.43

—Department of Transportation records, 15.18

—electronic, 15.20, 15.28

—medical records, 15.46

—police records, 15.11–.17

—school records, 15.45

Sanctions for disclosure, 15.47

Waiver of parental consent for abortion, 18.6

**Confrontation of Witnesses, 2.25, 9.6, 10.14, 17.10****Consent**

*See* Abortion; Termination of Parental Rights

**Consent Decree, 8.22–.43**

Generally, 8.23

Amended, 8.24

Extension, 8.41

Procedure, 8.24

Reinstatement of petition, 8.39, 8.42  
 Termination, 8.38–.42  
 Terms and conditions, 8.26–.34  
 Time periods, 8.39, 8.41

### **Contempt**

Under chapter 785, 16.18–.21  
 Counsel, right to, 2.10  
 Defenses, 16.23–.26  
   —excessive jail time, 16.24  
   —less restrictive alternatives, 16.23  
   —nature of contempt action, 16.25  
   —reasonableness of purge condition, 16.26  
 Delinquency petition alleging, 16.16  
 Disclosure, improper, 15.47  
 Failure to appear, 8.3, 10.4, 11.5  
 Noncompliance with dispositional order, 5.46, 16.14–.21  
 Notice, 16.18  
 Parents, 16.18  
 Punitive, 16.19, 16.21, 16.25  
 Purge condition, 16.19, 16.26  
 Remedial, 16.18–.20, 16.25

### **Continuance**

Computing time periods, 10.11–.13, 11.6  
 Dispositional hearing, 11.5–.6  
 Extension hearing, 12.24  
 Fact-finding hearing, 10.4, 10.12  
 Initial hearing on termination of parental rights, 17.39  
 Permanency hearing, 10.13  
 Plea hearing, 8.3, 8.7–.8

### **Continuing Need of Protection or Services, 17.18**

*See also* Children in Need of Protection or Services; Juveniles in Need of Protection or Services; Termination of Parental Rights

### **Continuing Parental Disability, 17.19**

*See also* Termination of Parental Rights

### **Coordinated Services Plan of Care, 11.9, 11.30, 11.43**

### **Corporation Counsel, 3.3–.6**

*See also* Prosecutor

### **Correctional Facility**

*See* Juvenile Correctional Facility

### **Corrective Sanctions Supervision, 11.41**

### **Counsel**

*See also* Defense Counsel; Guardian ad Litem  
 Defined, 3.2  
 Effective assistance of, 2.5, 2.13, 17.7  
 Right to, 2.2–.16, 14.11, 17.7, 18.7  
 Right to, in CHIPS cases, 2.14, 3.2  
   —pilot program, 2.14, 3.2  
 Right to, in UCHIPS cases, 2.7, 2.15  
 Right to, waiver of, generally, 2.16

### **Counseling**

Informal disposition or deferred prosecution, 6.14

By intake worker, 3.16

**County Jail**

*See* Jail

**Court**

*See also* Adult Court; Juvenile Court; Waiver into Adult Court

Competency to proceed, 7.11, 7.14, 10.11, 11.6, 12.24

Defined, 3.9

Discretion, 3.9, 11.2, 13.11

**Court-Appointed Special Advocate**

Consent decree, 8.34

Role, 3.20

**Court Commissioner, Circuit, 3.11, 11.2****Court Records**

Agency access, 15.34

Confidentiality, 15.28–46

Discovery, 9.7

Electronic, 15.20, 15.28

In Camera Proceedings, 9.34

Researcher access, 10.7, 15.4, 15.8, 15.35

**Court Reports, 11.9–12**

Consideration of, at disposition, 11.17

Discovery, 9.7, 11.11

Extension of dispositional order, 12.26–.28

Nondisclosure, 11.11

Notice, 11.11

Termination of parental rights, 17.40, 17.54

Time for filing, 11.11

**Cross-examination of Witnesses, 2.25, 9.6, 17.10**

*See also* Witnesses

**Custody, Legal**

*See also* Legal Custodian; Uniform Child Custody Jurisdiction and Enforcement Act

Defined, 5.3

Jurisdiction, 4.33, 19.1–9. *See also* Indian Child Welfare Act; Uniform Child Custody Jurisdiction and Enforcement Act

Least restrictive alternative standard, 11.2

Termination of parental rights, 17.59

Transfer of

—disposition, 11.26, 11.52

—termination of parental rights, 17.59

**Custody, Physical, ch. 5**

*See also* Physical Custodian

Generally, 5.1–4

Agency, 3.18

Appeal of order, 5.39

As arrest, 5.48

County department, 3.18

Defined, 5.3

Hearing. *See* Detention

Holding child in, 5.13–16, 7.13

Holding expectant mother in, 5.13, 5.14, 7.13

Intake worker's review, 3.14

Nonsecure, 5.4, 16.3



Notice requirements, 5.17  
 Order, 5.38  
 Places for, 5.4  
 Release or delivery from, 5.11  
 Secure  
   —generally, 5.4  
   —criteria for holding child in, 5.15–.16  
   —defense arguments, 5.37, 16.9  
   —jail requirement, 5.16  
   —postadjudication, 5.40–.47  
   —sanctions, 5.45, 16.9  
 Taking child into, 5.5–.10  
   —agency or county department, 3.18  
   —reasonable grounds for, 5.8  
 Taking expectant mother into, 5.6–.9  
 Time period for filing petition, 7.13

## D

### DNA

Evidence, discovery, 9.22, 9.30  
 Testing, 11.44

### Declaration of Paternal Interest

Notice to declarant, 8.3, 10.4, 11.5, 17.30, 17.33, 17.41

### Defense Counsel

*See also* Counsel

Access to court records, 15.39  
 Role, 3.2  
   —detention hearing, 5.37  
   —dispositional hearing, 11.50, 11.55  
   —plea bargaining, 8.21  
   —plea hearing, 8.9–.18  
   —termination of parental rights, 17.50, 17.61

### Deferred Prosecution, 6.10–.27

Due process, 6.37  
 Motion for court-ordered, 9.52  
 Noncompliance, 6.25, 6.37  
 Notice, 6.13, 6.26  
 Petition filed despite, 6.27, 6.30  
 Termination of agreement, 6.13, 6.24–.27, 6.37  
 Terms, 6.12–.22  
 Time periods, 6.8, 6.22, 6.25

### Delay

In filing petition or charge, 4.7–.10, 7.14–.15. *See also* Petition  
 Periods excluded in computing time periods, 10.12, 11.6

### Delinquency

*See also* Waiver into Adult Court  
 Admission, 8.44  
 Burden of proof, 2.28  
 Consent decree. *See* Consent Decree  
 Counsel  
   —right to, 2.5, 2.12  
   —waiver of, 2.5  
 Criminal nature of proceedings, 2.23

Delinquent defined, 4.5  
 Discovery, 9.8–.35. *See also* Discovery  
 Disposition, 11.23–.48. *See also* Disposition  
 Double jeopardy, 16.10  
 Hearings  
   —detention hearing, 5.22–.26  
   —fact-finding hearing. *See* Fact-Finding Hearing  
   —plea hearing. *See* Plea Hearing  
 Jurisdiction, 4.4–.23  
 Jury trial, 2.18, 10.2  
 Mental disease or defect, plea of not responsible by reason of, 8.45  
 Notice to school officials, 15.30  
 Petition. *See* Petition  
 Plea bargaining, 8.20. *See also* Plea Bargaining  
 Prosecutor’s role, 3.5  
 Records, confidentiality, 15.10–.44  
 Sanctions. *See* Sanctions  
 Self-incrimination, right against, 2.23–.24  
 Summary judgment, 10.19  
 Suppression motions. *See* Motions  
 Venue, 4.36  
 Witnesses, 2.25

### **Department of Children and Families**

Role, generally, 3.18

### **Department of Corrections**

Access to agency records, 15.23  
 Office of Juvenile Offender Review, 12.26, 12.34  
 Role, generally, 3.18

### **Department of Transportation**

Confidentiality of records, 15.18

### **Deposition**

Audiovisually recorded, 10.14  
 Of victim, protection against compelled, 9.33

### **Detention**

*See also* Custody, Legal; Custody, Physical  
 Generally, ch. 5  
 Hearing, 5.19–.39  
   —defense counsel’s role, 5.37  
   —evidence, 5.21  
   —following dispositional order violation, 16.12  
   —notice, 5.24, 5.29, 5.34  
   —probable-cause determination, 5.21  
   —procedure, 5.21–.36  
   —rehearing, 5.26, 5.31, 5.36  
   —*Riverside* hearing, 5.21  
   —time, 5.21  
   —waiver, 5.25, 5.30, 5.35  
 At home, 11.48, 16.3  
 Short-term, 5.43, 16.12

### **Developmental Disability**

Continuing parental disability, 17.19  
 Waiver criteria, 14.20

### **Disclosure**

*See* Confidentiality; In Camera Proceedings

**Discovery**, 9.3–.39. *See also* Deposition; Evidence—Suppression issues; Psychological Examination; Witnesses

*Brady* rule, 9.9, 9.21

CHIPS, 9.5–.7, 9.37–.39

Civil procedure, 9.37

DNA evidence

—disclosure by juvenile, 9.30

—disclosure by state, 9.22

Delinquency, 9.8–.35

—generally, 9.9

—continuing duty, 9.32

—criminal record of witnesses, 9.20, 9.27

—juvenile record, 9.15

—juvenile’s duty, 9.24

—juvenile’s statements, 9.14

—notice of alibi, 9.29

—physical evidence, 9.16, 9.28, 9.31

—prosecutor’s duty, 9.13

—protective orders, 9.33

—waiver cases, 14.10

—witness lists, 9.18, 9.25

—witness statements, 9.19, 9.26

Deposition, audiovisually recorded, 10.14

Exculpatory evidence, 9.21

Informers, 9.6

JIPS, 9.5–.7

Limits, 9.37, 9.39, 14.10

Police reports, 9.5, 14.10

Privileges and other protections, 9.38, 9.39

Protective orders, 9.33

Records relevant to subject matter of proceeding, generally, 9.7. *See also* Confidentiality

Risk-assessment tool, information pertaining to, 9.7

Timetable, 9.24

UCHIPS, 9.5–.7

Waiver into adult court, 9.35, 14.10

## **Discretion**

Judicial, 3.9, 11.2, 13.11

Prosecutorial, 3.6

## **Dismissal**

Motions to dismiss, 8.14–.16

Termination-of-parental-rights petition, 17.58, 17.60

Voluntary, of CHIPS proceeding, rules of civil procedure inapplicable, 10.16

## **Disposition**

*See also* Dispositional Alternatives; Dispositional Hearing; Dispositional Orders

Generally, 11.2

CHIPS and UCHIPS, 11.2, 11.52, 11.54–.55

Delinquency, 11.24–.48

—generally, 11.2, 11.20

—defense counsel’s role, 11.50

—dispositional alternatives, 11.24–.46. *See also* Dispositional Alternatives

Discretion, judicial, 3.9, 11.2

Drug offense, 11.28

Informal, 6.11–.27. *See also* Informal Disposition

JIPS, 11.2, 11.49

Least restrictive standard, 11.2, 11.26

Termination of parental rights, 17.53–.60

## **Dispositional Alternatives**

CHIPS, 11.52

Delinquency, 11.24–.46

—alcohol or drug treatment or education, 11.37

—community service, 11.33

—computer use restrictions, 11.46

—coordinated services plan of care, 11.43

—counseling by court, 11.46

—DNA testing, 11.44

—drug testing, 11.46

—education programs, 11.36

—electronic monitoring, 11.40

—forfeiture, 11.32

—placement outside home, 11.26

—restitution, 11.29

—restriction or suspension of driving privileges, 11.31

—serious juvenile offender program, 11.41

—sex offender registration, 11.45

—youth report centers, 11.34

—special treatment or care, 11.30

—supervised independent living, 11.35

—supervised work program, 11.33

—supervision, 11.25

—surcharge, delinquency victim and witness assistance, 11.46

—teen court, 11.39

—transfer to foreign country, 11.46

—transfer of legal custody, 11.27

—victim-offender mediation program, 11.42

—volunteers in probation, 11.38

JIPS, 11.49

UCHIPS, 11.52, 11.53

## **Dispositional Hearing**, ch. 11

*See also* Disposition

Appearances, 11.5

Burden of proof, 2.31, 11.7

Continuance, 11.5–.6

Court report. *See* Court Reports

Defense counsel's role, 11.50, 11.55

Due process, 11.24

Evidence, 11.7

Notice, 11.5

Procedure, 11.4–.21

Summons, 11.5

Termination of parental rights, 17.39, 17.56

Time periods, 11.5–.6

## **Dispositional Orders**, 11.17–.21

*See also* Disposition

Generally, 11.17

Appeal. *See* Appeal

Contents, 11.21

Defense counsel's role, 11.50, 11.55

Discretion, judicial, 3.9, 11.2

Extension, 12.23–.29

—generally, 12.23

—burden of proof, 2.30

—continuance, 12.24

—court report, 12.26–.28

—duty to warn, 12.35

—guardian ad litem, 3.7

—hearing, 12.23, 12.24, 12.29

- notice, 12.23
- temporary, 12.24
- termination-of-parental-rights proceedings, 12.27
- time periods, 12.23–.24, 12.29
- venue, 4.40
- Noncompliance with
  - contempt, 5.46, 16.14–.21
  - sanctions, 5.45, 16.1–.12
- Reasonableness of conditions, 16.7
- Revision, 12.1–.3. *See also* Extension *this heading*; Placement
  - generally, 12.3
  - duty to warn, 12.35
  - guardian ad litem, 3.7
  - hearing, 12.2–.3
  - venue, 4.40, 12.3
- Stay, 11.47, 13.14
- Termination of parental rights, 17.60
- Time periods, 11.19–.20

### **District Attorney, 3.3–.6**

*See also* Prosecutor

### **Driving Privilege**

Restriction or suspension, 11.31–.32, 11.48, 15.18, 16.3, 16.7, 16.11

### **Drug Abuse**

- Assessment and treatment, 6.15, 8.28, 11.28
- Dispositional alternatives, 11.28
- Finding of need for treatment and education, 10.18
- Multidisciplinary screen, 6.5
- Treatment or education, 11.37, 11.52, 11.53

### **Due Process**

- Dispositional hearing, 11.24
- Right to counsel, 2.5, 2.13–.14
- Right to present defense, 2.25, 9.6
- Sanctions, 16.4
- Termination of consent decree, 8.42
- Termination of informal disposition or deferred prosecution agreement, 6.37
- Waiver into adult court, 14.3

### **Duty to Warn**

- CHIPS and UCHIPS cases, 11.54, 12.35
- Changes in placement, 12.35
- Delinquency cases, 12.35
- JIPS cases, 12.35
- Termination of parental rights, 11.54, 12.35, 17.16, 17.18

## **E**

### **Education Programs, 11.36–.37, 11.52–.53**

Individualized education program (IEP), effect on out-of-home placement, 8.20, 11.19, 11.20, 12.8, 12.18, 12.21, 12.29

### **Effective Assistance of Counsel, 2.5, 2.13, 17.7**

### **Electronic Monitoring, 11.40–.41**

### **Escapees**

*See also* Runaway Child

Access to records, 15.24

## **Evidence**

*See also* Burden of Proof; Discovery; Witnesses

### **Admissibility**

- detention hearing, 5.21
- dispositional hearing, 11.7, 17.56
- intercepted communications, 9.17
- other court proceedings, 15.44
- postdispositional hearings, 12.2
- sanctions hearing, 16.4, 16.8
- termination-of-parental-rights proceedings, 17.45, 17.56, 17.61
- waiver hearing, 14.11, 14.14–.15, 14.19–.24

Exclusion of other acts, 9.49, 17.61

Illegally obtained, 2.26

*McMorris*, 9.24

Physical, 9.16, 9.28, 9.31

Right to present, 2.25, 9.6, 17.11

Suppression issues, 9.42, 9.48

Suppression motions, 9.45–.48. *See also* Motions

*Whitty*, 9.49, 17.61

## **Examination, Psychological**

*See* Psychological Examination

## **F**

### **Fact-Finding Hearing**, ch. 10

Generally, 10.2

Appearances, 10.4–.9

Burden of proof, 2.28–.30, 10.2, 10.17

Conclusions of law, 10.18

Continuance, 10.4, 10.12

Deposition, audiovisually recorded, 10.14

Findings of fact, 10.18

Guardian ad litem, 3.7, 10.15

Jury instructions, 10.15

Jury selection, 10.15, 17.51

Notice, 10.4

Procedure, 10.3–.16

Public attendance, 10.6–.7, 17.44

Reasonable efforts findings, 10.13

Summary judgment, 10.19, 17.48

Summons, 10.4

Termination of parental rights, 17.43–.52

Time periods, 10.4, 10.11–.13

### **Father, Biological**

*See also* Parents

Notice to, 8.3, 10.4, 11.5, 17.30, 17.33, 17.41

Paternity determination, 17.41

### **Findings of Fact**

Dispositional order, 11.21

Extension of dispositional order, 12.29

Fact-finding hearing, 10.18

Parental unfitness, 17.52

Termination of parental rights, 17.54



**Firearms**

Access to records, 15.36  
Custody criteria, 5.15

**Forfeiture**

Generally, 11.32  
Drug offenses, 11.28

**Forum, Inconvenient, 19.8****Foster Home**

Placement, 5.4, 11.26, 11.41, 11.52. *See also* Placement

**Foster Parent**

Access to records, 15.43, 15.46  
Attendance at hearing, 10.7, 15.7, 17.56  
Statement regarding extension of order, 12.29

**Franks Hearing, 7.24****Fugitives**

*See* Escapees; Runaway Child

**G****Gang Affiliation, 9.49, 15.32****Graffiti**

Work as consent decree condition for violation, 8.33

**Group Home**

Placement, 5.4, 11.26, 11.41. *See also* Placement

**Guardian**

*See* Guardianship

**Guardian ad Litem**

Generally, 3.7  
CHIPS, 3.7  
—appointment, 2.6, 3.7  
—jury selection, 10.15  
JIPS, 2.6, 3.7  
Termination of parental rights, 2.8, 3.7, 17.51  
UCHIPS, 2.7, 3.7  
Waiver of parental consent for abortion, 18.8–.9

**Guardianship**

Guardian ad litem's role, 3.7  
Guardian's access to records, 15.13, 15.21, 15.29, 15.46  
Jurisdiction, 4.32  
Pending adoptive placement, 17.59  
Termination of parental rights, 17.59  
UCCJEA applicability, 19.1  
Venue, 4.38

**H****HIV Test Results**

Confidentiality, 15.46

Inadmissibility, 11.7

**Habeas Corpus, Writ of**, 4.33

**Hate Crime**, 11.33, 11.36, 11.42

## Hearings

*See also* Detention; Dispositional Hearing; Fact-Finding Hearing; Plea Hearing

Confidentiality, 15.2–.8

Exclusion of child from, 8.4, 10.8, 15.3, 17.44

Consent decree, extension of, 8.41

Dispositional order, extension of, 12.23–.24, 12.29

*Franks*, 7.24

Mental responsibility or competency, 8.45, 9.50

—detention hearing, 5.22–.26

Permanency plan, 8.36, 12.20, 12.30

Placement, change in, 12.2, 12.8–.9, 12.18

Postdispositional, generally, 12.2

Public attendance

—generally, 15.4

—fact-finding hearing, 10.6–.7, 17.44

—other persons approved by court, 15.8

—plea hearing, 8.4

—termination of parental rights, 17.44

Restitution, 11.29

Revocation of community supervision, 12.16

Sanctions, 16.3, 16.8, 16.11–.12

Termination of parental rights, 17.38–.52. *See also* Termination of Parental Rights

Waiver into adult court, 14.3, 14.7–.12

Waiver of parental consent for abortion, 18.9

**Home Detention**, 11.48, 16.3

*See also* Detention

## Homicide

Dispositional alternatives, 11.26, 11.41

Grounds for termination of parental rights

—homicide of other parent, 17.24

—homicide of child, 17.26

Jurisdiction, 4.15, 4.17

Public attendance at hearings, 15.4

Secure custody, 5.15, 5.42

Waiver into adult court, 14.3

## I

**In Camera Proceedings**, 9.34

## Independent Living

*See* Supervised Independent Living

## Indian Child Welfare Act (ICWA)

Burden of proof

—postdisposition, 12.2

—termination of parental rights, 2.29, 10.1, 17.12, 17.66–.69

Counsel, right to, 2.14, 3.2

Findings

—consent decree, 8.35

- court report, 11.10, 17.40
- disposition, 11.21
- extensions, 12.27, 12.29
- fact-finding hearing, 10.2
- postdispositional sanctions, 16.3, 16.11
- permanency plan, 11.14, 12.30
- Indian child custody proceeding, defined, 4.25
- Indian juvenile custody proceeding, defined, 4.24
- Jurisdiction, 4.22, 4.25, 4.32, 4.33
- Notice, 4.22, 8.3, 10.4, 10.11, 10.12, 11.5, 12.3, 12.11, 12.19, 12.20, 12.23, 12.30, 17.32, 17.37
- Petition requirements, CHIPS, UCHIPS, JIPS, 7.18
- Placement preference, order, 11.10, 11.14, 11.21, 11.26, 11.52, 12.11, 12.19, 12.30
- Termination of parental rights, 17.63–.69
  - burden of proof, 2.29, 10.1, 17.12, 17.66–.69
  - jurisdiction, 17.65
  - notice, 17.32, 17.37
  - voluntary, 17.62
- Time periods, 7.14, 8.7, 10.4, 10.11, 10.12, 11.5, 11.6, 12.19, 12.24, 17.37

### **Individualized Education Program (IEP)**

*See* Education Programs

### **Informal Disposition**

Generally, 6.11–.27

Motion for court-ordered, 9.51

Noncompliance, 6.25, 6.37

Notice, 6.13, 6.26

Petition filed despite, 6.27, 6.30

Termination of agreement, 6.13, 6.24–.27, 6.37

Terms, 6.13–.15, 6.22

Time periods, 6.8, 6.22, 6.25

### **Informers**

Discovery, 9.6

### **Intake Inquiry, ch. 6**

*See also* Intake Worker

Closing the case, 6.9, 6.30

Custody review, 3.14

Deferred prosecution. *See* Deferred Prosecution

Informal disposition. *See* Informal Disposition

Interview of child, 3.14

Multidisciplinary screen, 6.5

Notice, 6.6

Procedure, 6.4

Purpose, 6.3

Referral back to, 7.3, 7.7

Referral from another county, 6.36

Request for filing of petition, 6.8, 6.28, 7.3. *See also* Petition

Rights, appraisal of, 6.6

Standard of proof, 6.3

Time periods, 6.8, 6.34–.36

### **Intake Worker**

*See also* Intake Inquiry

Investigation of juvenile's alleged crime, 3.14, 6.3

Judge as, 3.10, 7.7

Role, 3.13–.17

### **Intensive Field Supervision, 12.33**

*See also* Community Supervision; Corrective Sanctions Supervision; Intensive Sanctions Supervision

**Intensive Sanctions Supervision**, 11.41**Interlocutory Appeal***See* Appeal**Interpreter**

Appointment, effect on time periods, 10.12

**Interrogation**, 5.48, 9.47**Interview**

Of child

—audiovisual recording, 10.14

—by intake worker, 3.14, 14.20

**Involuntary Commitment***See also* Chapter 51

Child taken into custody, 5.11

**J****JIPS***See* Juveniles in Need of Protection or Services**Jail**

Contempt, 5.46, 16.24

Criteria for holding child in, 5.16, 5.43

Postadjudication placement in, 5.41, 5.43, 5.45, 11.26

Sanction for noncompliance with dispositional order, 5.45, 5.46, 11.48, 16.3, 16.9

Short-term detention, 5.43, 5.47

**Judge, Juvenile Court***See also* Court

Generally, 3.10

Consultation with child, permanency hearing, 11.14, 12.30

Defined, 3.9

Discretion, 3.9, 11.2, 13.11

As intake worker, 3.10, 7.7

Recusal, 8.43

Substitution. *See* Substitution of Judge**Jurisdiction**, ch. 4*See also* Competency of Court to Proceed; Uniform Child Custody Jurisdiction and Enforcement Act

Generally, 4.3

Adult court

—additional charges, 14.27

—exclusive original jurisdiction, 4.17

Adults, 4.31

All-terrain vehicle violation, 4.28

Boating violation, 4.28

CHIPS, 4.25

Chapters 51 and 55, 4.29

Civil law violation, 4.27

Custody, legal, 4.33, 19.1–9. *See also* Indian Child Welfare Act; Uniform Child Custody Jurisdiction and Enforcement Act

Delinquency, 4.4–23

Emergency, temporary, 19.6

Home state, 19.3

Indian juveniles, 4.22, 4.23. *See also* Indian Child Welfare Act

JIPS, 4.6, 4.24  
 Motorcycle, limited-use, off-highway violation, 4.28  
 Municipal ordinance violation, 4.27  
 Snowmobile violation, 4.28  
 Time period, failure to act within, 7.11, 7.14, 10.11, 11.6, 11.15, 12.24  
 Traffic violation, 4.28  
 Transfer of, to juvenile court, 4.18  
 UCHIPS, 4.26  
 Utility-terrain vehicle violation, 4.5, 4.28  
 Waiver of, by juvenile court. *See* Waiver into Adult Court  
 Waiver of parental consent to abortion, 4.30

## **Jury**

Instructions, 10.15  
 Selection, 10.15, 17.51  
 Trial by  
   —request for, 8.13, 17.39  
   —right to, 2.18–21, 10.2, 14.11

## **Juvenile**

Defined, 4.24  
 Prior record, 9.15, 14.21  
 Use of term, ch. 1

## **Juvenile Correctional Facility**

Defined, 11.26  
 Escapee's records, 15.24  
 Extension of dispositional order, 12.26  
 Placement in, original, 5.42, 11.26, 11.41  
 Release or discharge from, 12.15, 12.17  
 Return to, 12.14, 12.33  
 Time periods, 11.20, 12.17  
 Transfer from, 4.19, 5.4, 11.25, 11.26, 12.11, 12.13, 12.14, 12.15, 14.23, 16.9  
 Transfer or change in placement to, 5.44, 12.13

## **Juvenile Court**

*See also* Court Records; Jurisdiction  
 Generally, 3.9–.11  
 Circuit court commissioner, 3.11, 11.2  
 Jurisdiction, waiver of. *See* Waiver into Adult Court

## **Juvenile Delinquency**

*See* Delinquency

## **Juvenile Detention Facility**

Criteria for holding child in, 5.15  
 Post-adjudication placement in, 5.43, 5.45–.47, 11.26, 16.3, 16.9

## **Juvenile Record**

Discovery, 9.15  
 Waiver criteria, 14.21

## **Juveniles in Need of Protection or Services (JIPS)**

Ability to assist in defense, 9.50  
 Burden of proof, 2.30  
 Consent decree. *See* Consent Decree  
 Continuing need, 17.18  
 Counsel, right to, 2.6  
 Detention hearing procedure, 5.32–.36  
 Discovery, 9.5–.7

Disposition, 11.2, 11.49. *See also* Disposition  
 Duty to warn, 11.54, 12.35  
 Fact-finding hearing. *See* Fact-Finding Hearing  
 Grounds, 4.24, 10.17  
 Guardian ad litem, 2.6, 3.7  
 Jurisdiction, 4.24  
 Jury trial, 2.18, 10.2  
 Notice to school officials, 15.30  
 Petition. *See* Petition  
 Plea Hearing. *See* Plea Hearing  
 Prosecutor, 3.5  
 Sanctions. *See* Sanctions  
 Venue, 4.36  
 Witnesses, 2.25

## L

### Law Enforcement

*See* Police

**Least Restrictive Alternative**, 11.2, 11.26

### Legal Custodian

Access to records, 15.13, 15.21, 15.29, 15.46

### Legal Custody

*See* Custody, Legal

### License, Driver's

*See* Driving Privilege

## M

### Mediation

Victim-offender, 11.42

### Medical Records

Confidentiality, 15.46

Termination of parental rights, 17.59

### Mental Disease or Defect

*See also* Competency of Individual

Continuing parental disability, 17.19

Detention hearing, 5.22–.26

Hearing regarding, 8.45, 9.50

Jury trial, 2.18

Plea of not responsible by reason of, 8.45

Waiver criteria, 14.20

### Motions

Contempt, 16.20

Deferred prosecution, 9.51

To dismiss, 8.14–.16

—jurisdictional issue, 4.9

—time period violations, 7.11, 7.14, 8.15

Exclusion of other acts (*Whitty*) evidence, 9.49, 17.61

In limine, 9.49, 17.61

Informal disposition, 9.51

Pretrial, 9.41–.50



Procedure, 9.2  
Psychological evaluation, challenge to request for, 9.43  
Requesting filing of petition, 7.9  
For sanctions, 16.4, 16.11  
Substitution. *See* Substitution of Judge  
Suppression, 9.45–.48  
—confession, 9.47  
—illegal arrest, 9.46  
—searches, 9.48  
—time period, 9.42  
Time periods, 9.42

### **Multidisciplinary Screen, 6.5**

### **Municipal Lockup Facility**

Criteria for holding child in, 5.16

### **Municipal Ordinance Violation**

Jurisdiction, 4.27

Venue, 4.36

## **N**

### **Neglect**

CHIPS, 4.25, 17.27

Physical custody, 5.4, 5.14

Referral to intake worker, 6.4

Termination of parental rights, 17.22, 17.26, 17.27

### **News Media**

Access to records, 15.12

Attendance at hearing, 10.7, 15.6

### **Nonsecure Custody, 5.4, 16.3**

*See also* Custody, Physical

### **Notice**

*See also* Indian Child Welfare Act; *and individual topics* (e.g. Fact-Finding Hearing)

Right to, generally, 2.33

Victim, right to, 8.3

## **O**

### **Office of Juvenile Offender Review, 12.26, 12.34**

### **Operating Privilege**

*See* Driving Privilege

### **Orders**

*See also* Dispositional Orders

Appeal. *See* Appeal

Custody, physical, 5.38–.39

Final, generally, 13.2

Nonfinal, generally, 13.2

Protective, 9.33

### **Ordinance Violation**

Jurisdiction, 4.27

Venue, 4.36

## P

### Parents

*See also* Father, Biological; Foster Parent; Termination of Parental Rights

Access to records, 15.13, 15.21, 15.29, 15.46

Confrontation of witnesses, 2.25

Consent for abortion. *See* Abortion

Contempt, 16.18

Continuing disability, 17.19

Counsel

—right to, 2.12–.14, 17.7

—waiver of, 2.13

Criminal record, 17.61

Definition, chapter 48, 17.3

Failure to assume parental responsibility, 17.22

Homicide, 17.24

Incestuous, 17.23

Jurisdiction, 4.31

**Parties**, ch. 3

### Paternal Interest

*See* Declaration of Paternal Interest

**Paternity Determination**, 17.41

### Penalties

Adult court, 4.19, 4.28

**Permanency Plan**, 11.14–.15

Consultation between court and child, finding, 11.14

Extension of dispositional order, 12.27

Guardian ad litem's role, 3.7

Hearing

—consent decree, 8.36

—placement, change in, 12.20

—review, 12.30

Revised, 11.15

Termination of parental rights, 17.60

Time periods, 11.15

**Personality of Juvenile**, 14.20

**Petition**, ch. 7

Amendment, 7.25

Challenges

—intake inquiry time period, 6.34–.36

—sufficiency, 7.21–.24, 8.16

Contempt, 16.16

Filing

—deferred prosecution agreement terminated by, 6.27

—delayed, 4.7–.10, 7.14–.15

—despite deferred prosecution agreement, informal disposition, or closing of case, 6.27

—informal disposition terminated by, 6.27

—intake worker's request for, 6.8, 6.28, 7.3

—ordered by court, 7.9

Formal requirements, 7.18

Leave to appeal a nonfinal order, 13.4–.5, 13.9  
 Material misstatement, 7.24  
 Motion to dismiss. *See* Motions  
 Persons who may file, 7.5–.7, 7.9  
 Persons who must sign, 7.4  
 Probable cause, 7.19, 7.22  
 Procedure, 7.2–.16  
 Reinstatement, 8.39, 8.42  
 Sufficiency, 7.17–.25  
 Termination of parental rights. *See* Termination of Parental Rights  
 Time periods, 7.11–.16  
   —after cancellation of informal disposition or deferred prosecution agreement, 6.25  
   —after deferred prosecution agreement, informal disposition, or closing of case, 6.30, 7.16  
   —after referral from intake, 7.3, 7.12–.15  
   —challenges to sufficiency, 7.21–.24  
   —child or expectant mother held in custody, 7.13  
   —excluded periods, 7.14  
   —extension, 7.13–.14  
   —intake inquiry, 6.34–.36  
   —motion to dismiss for violation, 7.11, 7.14, 8.15  
 Waiver into adult court. *See* Waiver into Adult Court  
 Waiver of parental consent for abortion, 18.6

### Physical Custodian

Access to records, 15.43  
 Attendance at hearing, 10.7, 17.56

### Physical Custody

*See* Custody, Physical

**Physical Evidence**, 9.16, 9.28, 9.31

### Physical Placement

*See also* Visitation  
 Continuing denial of, 17.20

### Placement

*See also* Physical Placement  
 Change in,  
   —generally, 12.4–.21  
   —by Department of Corrections, 12.11–.17  
   —duty to warn, 12.35  
   —emergency, 12.8  
   —expiration of order, 12.21  
   —guardian ad litem's role, 3.7  
   —hearing, 12.2, 12.8, 12.9, 12.16  
   —from in-home placement, 12.9  
   —from out-of-home placement, 12.8  
   —notice, 12.8–.9, 12.11, 12.13–.15  
   —order, 12.19  
   —posttermination of parental rights, 4.41, 17.60  
   —requested by person or agency bound by order, 12.18  
   —requested by person or agency responsible for implementing order, 12.7–.17  
   —secured juvenile facility or secured residential care center for children and youth, 5.44, 12.12–.17  
   —venue, 4.40  
   —witnesses, confrontation, 2.25  
 Department of Corrections review, 12.12. *See also* Office of Juvenile Offender Review  
 Detention hearing issue, 5.37  
 At disposition, 11.21, 11.26, 11.52–.53  
 Interim, 11.21  
 Out-of-home

- child with IEP, 8.20, 11.19, 11.20, 12.8, 12.18, 12.21, 12.29
- change-in-placement order, findings, 12.19. *See also* Indian Child Welfare Act.
- consent decree, findings, 8.35
- decisions by care providers, reasonable-and-prudent-parent standard, 11.14, 12.30
- Permanency plan. *See* Permanency Plan
- Plea bargaining, 8.20
- Plea hearing issue, 8.18
- Transitional, 11.21
- Venue, 4.40, 4.41

## **Plea**

*See also* Admissions

- Generally, 8.1
- Determination of voluntariness and understanding, 8.44
- Mental disease or defect, plea of not responsible by reason of, 8.45
- Waiver petition, effect on, 8.17

## **Plea Bargaining**, 8.19–.43

*See also* Consent Decree

- Generally, 8.20
- Defense counsel's role, 8.21
- Placement, 8.20

## **Plea Hearing**, ch. 8

- Generally, 8.1
- Admissions, determination of voluntariness, 8.44
- Appearances, 8.3–.4
- Continuance, 8.3, 8.7–.8
- Defense counsel's role, 8.9–.18
- Entry of plea, 8.1, 8.17
- Failure to appear, 8.3
- Jury trial request, 8.13
- Motions to dismiss, 8.14–.16
- Notice, 8.3, 8.8
- Placement issue pending proceedings, 8.18
- Procedure, 8.2–.8
- Public attendance, 8.4
- Restraints, use of, 8.5, 16.4
- Rights, appraisal of, 8.8
- Substitution of judge, 8.10–.12
- Summons, 8.3
- Time periods, 8.7
- hearings on plea of not responsible by reason of mental disease or defect in delinquency case, 8.45
- service, 8.3
- violation, 8.15

## **Police**

- Access to court or school records, 15.32, 15.45
- Intake worker's role, 3.14
- Records, confidentiality, 15.12–.17
- Report
  - discovery, 9.5, 14.10
  - intake inquiry time period, 6.35
- Role, 3.19

## **Postdispositional Proceedings**, ch. 12

*See also* Dispositional Orders; Placement

## **Power of Attorney, Delegation of Parental Powers**, 7.8, 18.4

**Pretrial Motions**

*See* Motions

**Prior Record**

*See* Juvenile Record; Parents, Criminal Record

**Probable Cause**

Arrest, 9.46  
Defined, 5.8, 9.46  
Delinquency or JIPS petition, 7.19, 7.22  
Detention hearing issue, 5.21  
Waiver proceeding. *See* Prosecutive Merit

**Proof, Burden of**

*See* Burden of Proof

**Prosecution, Deferred**

*See* Deferred Prosecution

**Prosecutive Merit**

Waiver into adult court, 14.10, 14.14–.15

**Prosecutor**

Discovery duty, 9.13  
Discretion, 3.6  
Role, generally, 3.3–.6

**Protective Orders, 9.33****Protective Placement**

*See* Chapter 55

**Psychological Examination, 9.43, 9.50**

Challenge to request for, 9.43  
Time periods, effect on, 10.12, 11.6  
Waiver criteria, 14.20

**Q**

**Qualified Residential Treatment Program**, ch. 1, 5.21, 5.38, 8.24, 8.35, 11.10, 11.14, 11.21, 12.8, 12.18, 12.30

**Qualifying Residential Family-Based Treatment Facility**, ch. 1, 4.25, 5.4, 11.14

**R**

**Reasonable-and-Prudent-Parent Standard**, 11.14, 12.30

**Records**

*See* Agencies; Confidentiality; Court Records; Juvenile Record; Medical Records  
In Camera Proceedings, 3.7, 9.35

**Recusal of Judge**, 8.43

**Rehabilitation Plan**, 11.9

**Rehearing**

Detention hearing, 5.26, 5.31, 5.36

**Reports**

*See* Court Reports; Police

**Residential Treatment Center**, 11.52**Restitution**

Generally, 11.28

Consent decree, 8.29

Deferred prosecution agreement, 6.16

Offenses dismissed and read in, 11.25, 11.29

**Restraints, Use of**

Plea hearing, 8.5

Sanctions hearing, 16.4

**Rights**, ch. 2

*See also* Due Process; Indian Child Welfare Act; Termination of Parental Rights; Waiver

To confront and cross-examine witnesses, 2.25, 9.6

To counsel, 2.2–.16, 14.11, 17.7, 18.7

Detention hearing, 5.24, 5.29, 5.34

To discovery, 9.9

Intake inquiry, 6.6

To jury trial, 2.18–.21, 10.2, 14.11

Notice of, generally, 2.33

To present a defense, 2.25, 9.6, 17.11

To silence. *See* Self-Incrimination

Against unreasonable search and seizure, 2.26, 9.48

**Riverside Hearing**, 5.21**Runaway Child**

Access to records, 15.24

Juvenile detention facility, 5.15

**S****Sanctions**

*See also* Contempt; Corrective Sanctions Supervision; Intensive Sanctions Supervision

Burden of proof, 2.31, 16.8

Defenses

—double jeopardy, 16.10

—notice, 16.6

—proof of violation, 16.8

—reasonableness of conditions, 16.7

—sanction to secure custody, 16.9

Disclosure, improper, 15.47

Double jeopardy, 16.10

Due process, 16.4

Evidence, 16.4, 16.8

Hearing, 16.4, 16.8, 16.11–.12

Noncompliance with dispositional order, 5.45, 16.1–.12

Notice, 11.48, 16.4, 16.6, 16.11–.12

Period of custody, 16.3, 16.9

Procedure, 16.4

Secure custody, 5.45, 16.9

Serious juvenile offender program, 11.41, 12.33

Short-term detention, 16.12

Truancy, 16.11



**School**

Parents' attendance at, 6.21, 8.32

**School Officials**

Access to records, 15.14, 15.30

**School Records**

Confidentiality, 15.45

**Scientific Testing**, 9.31**Screen, Multidisciplinary**, 6.5**Search, Unreasonable**, 2.26, 9.48**Secure Custody**

*See* Custody, Physical

**Secured Residential Care Center for Children and Youth**

County supervision, ch. 1, 3.11, 5.4, 11.21, 11.25, 11.26, 12.11, 12.13, 12.15, 14.23, 16.9

Defined, 5.42

Escapee's records, 15.24

Placement in, 5.42, 11.26, 11.41

Release or discharge from, 12.15, 12.17

Return to, 12.33

Time periods, 11.20, 12.17

**Self-Incrimination**, 2.22–.24

CHIPS cases, 2.24, 9.39

JIPS cases, 2.24, 9.39

Termination-of-parental-rights proceedings, 17.9

UCHIPS cases, 2.24, 9.39

**Sentencing**

Discovery of information relating to risk-assessment tool, 9.7

**Serious Juvenile Offender Program**, 12.32–.34

Generally, 11.41

Access to juvenile's court records, 15.40

Time periods, 11.20, 12.17, 12.34

**Services**

*See also* Coordinated Services Plan of Care

Dispositional order, 11.21, 11.25

Permanency plan, 11.14

Reasonable effort to provide, 17.18

**Sexual Assault**

DNA testing, 11.44

Definition, 17.25

Discovery limitation, psychiatric or psychological examination of victim, 9.43

Evidence, other acts exception, 9.49

Public attendance at hearing, 8.4, 10.6, 15.4

Termination of parental rights, 17.25, 17.33

**Sexual Predator**

Access to records relating to, 15.25, 15.37

Commitments, 12.36

Registration requirements, 11.45

**Shackling**

*See* Restraints, Use of

**Shelter Care Facility**

Defined, 5.4

**Siblings**

Joint placement considerations and findings

—change in placement, 12.9, 12.19, 12.29

—consent decree, 8.35

—court report, 11.10

—custody orders, 5.38

—disposition, 11.2, 11.21

—extension, 12.29

—permanency plan, 11.14, 12.30

**Silence**

*See* Self-Incrimination

**Social Service Agencies**

*See* Agencies

**Special Treatment or Care, 11.30, 11.52–.53****Statements**

Of juvenile

—discovery, 9.14

—interception of, 9.17

—prosecutive merit, 14.15

—suppression, 9.47

Of witnesses, 9.19, 9.26

**Statutes of Limitation**

*See also* Time Periods

Delinquency, 4.20

**Stay**

Contingent on compliance, 11.47

Pending appeal, 13.14

UCCJEA, inconvenient forum, 19.8, 19.13

**Subpoena**

Right, 2.25

**Substitution of Judge**

Plea hearing, 8.10–.12

Review of denial of request for, 13.4

Right to, generally, 2.34

Termination-of-parental-rights proceedings, 17.13, 17.39

Waiver, 8.12

**Summary Judgment, 10.19, 17.48****Summons**

Dispositional hearing, 11.5

Fact-finding hearing, 10.4

Plea hearing, 8.3

Termination of parental rights, 17.33–.35

**Supervised Independent Living, 11.35, 11.52**

**Supervised Work Program**

Generally, 11.33

Consent decree, 8.30

Deferred prosecution agreement, 6.17

Drug offense, 11.28

**Supervision**, 11.25, 11.41, 11.52–53*See also* Corrective Sanctions Supervision; Intensive Sanctions Supervision; Supervised Work Program**T****TPR***See* Termination of Parental Rights**Teen Court Program**, 6.19, 8.31, 11.39**Telephonic or Live Audiovisual Testimony**, ch. 1, 8.6, 10.9, 16.4, 17.44**Termination of Parental Rights**, ch. 17

Alternatives to, 17.61

Appeal, 13.13, 17.60

—signature requirements, 13.13, 17.60

Appearance, 17.44

Best interest standard, 17.55

Burden of proof, 2.29, 17.12, 17.56

Counsel

—right to, 2.8, 2.13

—waiver of, 2.13, 17.7

Court report, 17.40, 17.54

Default for failure to appear, 17.50

Defense counsel's role, 17.61

Discovery, 9.5–7, 9.37–39

Dismissal, 17.58

Disposition

—hearings, 17.56

—court orders, 17.60

—postdispositional relief, 13.12, 13.13

—standards and factors considered, 17.55

Dispositional alternatives

—dismissal of petition, 17.58

—termination of parental rights, 17.59

Duty to warn, 11.54, 12.35, 17.16, 17.18, 17.61

Evidence, 17.45, 17.56, 17.61

Grounds for, 17.14–27

—abandonment, 17.16

—child abuse, 17.21

—child trafficking, 17.26

—commission of felony against child, 17.26

—continuing denial of periods of physical placement, 17.20

—continuing need for protection or services, 17.18

—continuing parental disability, 17.19

—failure to assume parental responsibility, 17.22

—homicide or solicitation to commit homicide, 17.24

—incestuous parenthood, 17.23

—intentional or reckless homicide of parent, 17.24

—parenthood as result of sexual assault, 17.25

—prior termination of parental rights, 17.27

—relinquishment, 17.17

Guardian ad litem's role, 2.8, 3.7, 17.51

**Hearings**

- continuance, 17.39
- dispositional, 17.56
- fact-finding, 17.43–.52
- initial, 17.38–.42
- Indian Child Welfare Act. *See* Indian Child Welfare Act
- Issue preclusion, 17.48
- Jurisdiction, 4.32
- Jury instructions, 10.15
- Jury trial right, 2.21, 17.8
- Motion, for remand, 13.13
- Notice, 17.30–.36. *See also* Duty to warn *this heading*
- Paternity determination, 17.41
- Permanency plan, 17.60
- Petition, 17.30
  - admission to, 17.42
  - dismissal, 17.58
- Postdispositional relief, 13.12, 13.13
- Procedure
  - disposition, 17.53–.60
  - filing petition, 17.30
  - hearing, fact-finding, 17.43–.52
  - hearing, initial, 17.38–.42
  - notice, 17.31–.36
  - time periods, 17.37
- Remand, 13.13
- Rights of parents, 2.13, 17.6–.13
  - burden of proof, 17.12
  - counsel, 17.7
  - cross-examination of witnesses, 17.10
  - jury trial, 17.8
  - presentation of evidence, 17.11
  - silence, 17.9
  - substitution of judge, 17.13
- Stipulation to an element, 17.59
- Summary judgment, 17.48
- Summons, 17.33–.35
- Time periods, 17.35, 17.37, 17.60
- UCCJEA applicability, 19.1
- Unfitness finding, 17.52
- Venue, 4.38, 4.41, 17.29, 17.62
- Videoconferencing procedures, 17.44
- Visitation, 17.20
- Voluntary, 17.62
  - admission to petition, 17.42
  - court report, 17.40
  - guardian ad litem’s role, 3.7
- Witnesses, confrontation of, 17.10

**Testimony**

*See* Witnesses

**Testing, Scientific, 9.31****Time Periods**

*See also* Age; Continuance; Statutes of Limitation; *and individual topics* (e.g. Plea Hearing)

Generally, 7.11

Missed, 7.11, 10.11, 11.6, 11.15, 12.24

—dismissal of petition, 7.11, 7.13, 8.15

Periods excluded in computing, 7.14, 10.12, 11.6

Termination of parental rights, 17.37

**Traffic Violation**

Confidentiality, 15.17, 15.42  
Jurisdiction, 4.28

**Treatment**

*See* Alcoholism; Care and Treatment Plan; Drug Abuse; Residential Treatment Center; Special Treatment or Care

**Trial**

Desirability of single trial, 14.24  
By jury. *See* Jury

**Trial Reunification**, ch. 1, 10.13, 12.2, 12.3, 12.23, 12.27, 12.30

**Truancy**

Contempt, 16.24  
Custody, 5.10  
Jurisdiction, 4.24  
Parents' attendance at school, 6.21  
Sanctions, 16.11

**U****UCCJEA**

*See* Uniform Child Custody Jurisdiction and Enforcement Act

**Unborn Child**

Defined, 4.26  
Pain, capacity to experience, 18.14  
Probable postfertilization age, 18.14

**Unborn Children in Need of Protection or Services (UCHIPS)**

Constitutionality of statute addressed, 4.26  
Counsel, right to, 2.7, 2.15  
Detention hearing procedure, 5.27–.31  
Discovery, 9.5–.7  
Dispositional alternatives, 11.52–.53  
Duty to warn, 12.35  
Grounds, 10.17  
Jurisdiction, 4.26  
Jury trial, request for, 2.20  
Unborn child, defined, 4.26

**Unfitness, Parental**, 17.52

**Uniform Child Custody Jurisdiction and Enforcement Act**, ch. 19

Generally, 19.1  
Best interest standard, 19.1  
Child custody determination, defined, 19.3  
Enforcement, 19.14–.18  
Home state, defined, 19.3  
Jurisdiction  
—emergency, 19.6  
—exclusive, continuing, 19.4  
—initial, 19.3  
—to modify custody determination, 19.5  
Jurisdiction, criteria for declining  
—inconvenient forum, 19.8  
—reason of conduct, 19.9

Procedure, 19.10–.13

## V

### Venue

*See also* Uniform Child Custody Jurisdiction and Enforcement Act

Generally, 4.34–.41

Indian juveniles, 4.36

Intake inquiry, 6.36

### Victim

*See also* Restitution; Sexual Assault

Access to records, 15.15, 15.31, 15.46

Attendance at hearings, 10.7, 15.5

Protection against compelled pretrial interview or deposition, 9.33

Rights Under Marsy's Law

—generally, 15.5

—attendance at hearings, 8.3, 10.7

—to be heard, 8.3, 8.20

—notice, 8.3

—standing to oppose defendant's motion for in camera review of victim's health-care records, 3.7, 9.7

**Victim-Impact Statement**, 11.12, 11.17

**Victim-Offender Mediation Program**, 11.42

### Victim-Witness Coordinator

Access to records, 15.15, 15.31

### Visitation

Continuing denial of, 17.20

Dispositional order, 11.21

Termination of parental rights, 17.20

**Voluntary Termination of Parental Rights**, 17.62

*See also* Termination of Parental Rights

Admission to petition, 17.42

Court report, 17.40

Guardian ad litem's role, 3.7

**Volunteers in Probation**, 6.18, 8.26, 11.38

## W

### Waiver

Into adult court. *See* Waiver into Adult Court

Of detention hearing, 5.25, 5.30, 5.35

Of objection to loss of competency. *See* Competency of Court to Proceed.

Of parental consent for abortion. *See* Abortion

Of right to counsel, generally, 2.16

Of time period, 7.11, 8.7, 10.11, 11.6, 12.24

**Waiver into Adult Court**, ch. 14

Generally, 4.15, 14.1

Absconded juvenile, 14.12

Alternatives to, 14.25

Appeal, 13.2, 13.9–.11

Burden of proof, 2.32, 14.11, 14.17. *See also* Prosecutive merit *this heading*



Counsel, right to, 14.11  
 Criteria for (section 938.18(5))  
   —generally, 14.19  
   —desirability of one trial, 14.24  
   —juvenile justice system resources, adequacy of, 14.23  
   —juvenile’s personality, 14.20  
   —juvenile’s prior record, 14.21  
   —offense, type and seriousness, 14.22  
 Defense counsel’s role, 14.6, 14.25  
 Denial, 14.26  
 Due process, 14.3  
 Discovery, 9.35, 14.10  
 Evidence, 14.11, 14.14–.15, 14.19  
 Grant, 14.26, 14.27  
 Hearing, 14.3, 14.7–.12  
 Jury trial, 2.18  
 Notice, 14.9  
 Order, as nonfinal, 13.2  
 Petition, 14.5–.6  
 Plea, entry of, 8.17  
 Procedure, 14.2–.12  
 Prosecutive merit, 14.10, 14.14–.15  
 Stay pending appeal, 13.14  
 Stipulation, 14.28  
 Substitution of judge, 2.34  
 Time periods, 14.5, 14.8  
 Venue, 4.36  
 Witnesses, confrontation of, 2.25, 14.11

## **Warrant, 5.7**

## **Weapons**

Access to records, 15.36  
 Custody criteria, 5.15

## **Witnesses.** *See also* Evidence; Testimony

Confrontation and cross-examination, 2.25, 9.6, 10.14, 17.10  
 Criminal record, 9.20, 9.27  
 Exclusion, for failure to submit notice of alibi, 9.29  
 Experts  
   —in termination of parental rights cases, 17.61  
   —in waiver cases, 14.11, 14.20  
 Informers, 9.6  
 Lists, 9.18, 9.25  
 Right to present, 2.25, 9.6, 17.11  
 Statements, 9.19, 9.26  
 Subpoena, 2.25  
 Unavailability, 10.12

## **Work Program**

*See* Supervised Work Program

## **Writs, 13.4**

Certiorari, 12.13–.14  
 Habeas corpus, 4.33

## **Y**

**Youth Report Center, 6.20, 8.27, 11.34**



# Supplement Subject Index

---

References are to sections and chapters, not pages.

## C

### **Children in Need of Protection or Services (CHIPS)**

Grounds:

—relinquishment, 7.19, 17.17

## L

### **Like-kin**

Defined, ch. 1

## P

### **Psychological Evaluation**

To support finding of coerced confession, 9.47

## T

### **Termination of Parental Rights**

Burden of proof, 2.29, 2.31, 17.42, 17.54, 17.55

## V

### **Victim**

Rights Under Marsy's Law

— protection from disclosure of privately held, privileged health-care records, 9.34, 15.20

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 64,356 (Oct. 24, 2022).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022); and all references to the Wisconsin Jury Instructions—Criminal are current through the 2022 release.

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the Wisconsin Administrative Code are current through Wis. Admin. Reg., Oct. 2022, No. 802.

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022); and all references to the Code of Federal Regulations (C.F.R.) are current through 87 Fed. Reg. 63,967 (Oct. 21, 2022).

<sup>[1]</sup> This form is designed for use in an original delinquency action under [Wis. Stat.](#) § 938.185(1). If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022); and all references to the Wisconsin Administrative Code are current through rules promulgated in the Wis. Admin. Reg., Oct. 2022, No. 782.

<sup>[2]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1). In addition, in counties where corporation counsel prosecute cases under [Wis. Stat.](#) § 938.13, including cases under [Wis. Stat.](#) § 938.13(12), modify the form as appropriate to refer to corporation counsel. See [Wis. Stat.](#) § 938.09.

<sup>[3]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1). In addition, in counties where corporation counsel prosecute cases under [Wis. Stat.](#) § 938.13, including cases under [Wis. Stat.](#) § 938.13(12), modify the form as appropriate to refer to corporation counsel. See [Wis. Stat.](#) § 938.09.

<sup>[4]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[5]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[6]</sup> This is an alternative to a formal petition for a writ of habeas corpus when an improper detention has resulted from a failure by a person other than the judge. If this motion fails, counsel probably can either appeal the denial or enter a writ in another branch of the circuit court or in the court of appeals.

<sup>[7]</sup> A petition for a writ of habeas corpus can be made to the supreme court, the court of appeals, or the circuit court of the county where the person is detained or, in some cases, to the circuit court of an adjoining county.

<sup>2</sup> The petition and writ should be accompanied by a short memorandum of law that establishes the statutory requirements for detention, the case law that preceded these statutes, and the application of the cases and the law to the juvenile’s case.

The memorandum should also elaborate on why the temporary custodian is appropriate to care for the juvenile. If the judge refuses to allow temporary release, the order can be crossed out before the judge signs.

The basis for the writ may be that the confining judge failed to properly follow the requirements of the statute.

<sup>[8]</sup> A petition for a writ of habeas corpus can be made to the supreme court, the court of appeals, or the circuit court of the county where the person is detained or, in some cases, to the circuit court of an adjoining county.

<sup>[9]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267.

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the United States Code (U.S.C.) are current through Public Law No. 117-214 (Oct. 19, 2022).

<sup>[10]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[11]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[12]</sup> Times are computed pursuant to [Wis. Stat.](#) § 990.001(4). This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[13]</sup> In some cases, defense counsel may wish to request a bill of particulars instead of a motion to make more specific. For a discussion of the bill of particulars, see Kathleen Pakes, *Wisconsin Criminal Defense Manual* § 5.41 (State Bar of Wis. 7th ed. 2020).

This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[14]</sup> See *supra* § 7.25. This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” [Wis. Stat.](#) § 938.225(1).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022); and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Sept. 8, 2022.

<sup>[15]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267.

<sup>[16]</sup> In cases alleging a violation of [Wis. Stat.](#) § 940.225(1) or 948.02(1), defense counsel should demand notice of any [Wis. Stat.](#) § 904.04(2)(b) evidence.

<sup>[17]</sup> This form is designed for use in delinquency cases. If modifying for use in JIPS proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[18]</sup> Typically, a release is not necessary to obtain social services records. Parental consent is necessary in most cases to obtain school records, pursuant to [Wis. Stat.](#) § 118.125. Mental health records are governed by [Wis. Stat.](#) § 51.30.

<sup>[19]</sup> This form is designed for use in delinquency cases. If modifying for use in JIPS proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[20]</sup> This form is designed for use in delinquency cases. If modifying for use in JIPS proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1). In addition, in counties where corporation counsel prosecutes cases under [Wis. Stat.](#) § 938.13, including cases under [Wis. Stat.](#) § 938.13(12), modify the form as appropriate to refer to corporation counsel. See [Wis. Stat.](#) § 938.09.

<sup>[21]</sup> Other grounds for this motion might be a consent that was not intelligently and voluntarily given or a failure to have a search warrant.

<sup>[22]</sup> This motion could be based on other grounds such as an unlawful taking of custody, failure to give *Miranda* warnings, or waiver of rights not intelligently and voluntarily given.

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022); and all references to the Wisconsin Administrative Code are current through the Wis. Admin. Reg., Oct. 2022, No. 802.

<sup>[23]</sup> This motion is designed for use when the dispositional report recommends placement in a secured facility.

<sup>[24]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

This form presents an outline format for the presenting of the alternative proposal. Some experts may wish to present their plans in other ways but should make sure any format fits the requirements of [Wis. Stat.](#) § 938.33.

<sup>[25]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

The petition should include factors indicating the reliability of the alleged new evidence. The new evidence may also indicate not that the adjudication was improper, but that another disposition would have been more appropriate. However, in most cases a motion for modification of the order will be the proper recourse in this situation.

<sup>[26]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).



<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; all references to the Wisconsin Administrative Code are current through rules promulgated in the Wis. Admin. Reg., Oct. 2022, No. 802; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022).

<sup>[27]</sup> This form is designed for use in delinquency cases. If modifying for use in proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Sept. 8, 2022.

<sup>[28]</sup> Counsel should check statutes for requirements relating to filing fees, service, and attachments. See [Wis. Stat.](#) §§ 809.25(2)(a)1., 809.80, 809.801, 801.14. A copy of the order sought to be reviewed must be attached. See [Wis. Stat.](#) § 809.50(1)(d).

This form is designed for use in delinquency cases. If modifying for use in JIPS proceedings under [Wis. Stat.](#) § 938.13(4), (6), (6m), (7), or (14), use the following caption: “In the Interest of \_\_\_\_\_, A Person Under the Age of 18.” See [Wis. Stat.](#) § 938.255(1).

<sup>[29]</sup> See also [Wis. Stat.](#) §§ 808.07(2)(a)1., 809.12. Counsel should note that the better practice may be to bring the motion for a stay in the circuit court. See *supra* § [13.13](#).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267.

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267, and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022).

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267.

<sup>1</sup> Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2019–20 Wisconsin Statutes, as affected by acts through 2021 Wis. Act 267; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 117-214 (Oct. 19, 2022).